Petition

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No.

In the Supreme Court of the United States

October Term, 1981

BRUNSON D. MOORE,
Petitioner,

vs.

EL PASO COUNTY, TEXAS,
T. Udell Moore, etc., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

When a federal constitutional claim is premised on an unsettled question of state law, the abstention doctrine requires that the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state law question. While the definitive state court holding is sought, the federal forum normally retains jurisdiction. Abstention cases arising in Texas are an exception to the general rule. In Texas, such cases are dismissed without prejudice. The questions presented involve the Texas exception to the normal practice of retaining jurisdiction. They assume that the state determination did not resolve the controversy and the claimant has returned to federal court. They further assume that the original federal suit was timely filed and the court was possessed of jurisdiction. The questions are as follows:

(1) May the refiling of the federal cause of action be barred by the application of the state statute of limitations?

(2) May the return to federal court be barred on any ground other than waiver once the initial suit was timely filed?

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra* at A1) is reported at 660 F. 2d 586 (5th Cir. 1981). The order of the district court (App. D, *infra* at A13) is not reported.

Petitioner has pursued the same cause of action on two separate occasions within the federal court system. The initial suit was dismissed without prejudice upon the motion of Respondent (App. E, *infra* at A14). The order granting this motion (App. F, *infra* at A16) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra* at A11) was entered on November 5, 1981. Petition for Rehearing was denied on December 28, 1981 (App. C, *infra* at A12). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The abstention doctrine is "judge made," *Zwickler v. Koota*, 389 U.S. 241, 248 (1967), and no specific constitutional or statutory provisions authorize its existence. The case also involves the Fourteenth Amendment to the United States Constitution, U.S. CONST. amend. XIV, §1; the Civil Rights Act of 1871, 42 U.S.C. §1983; two provisions of the Texas Constitution, TEX. CONST. Art. V, §18, TEX. CONST. Art. V, §24; and two Texas statutes, TEX. REV. CIV. STAT. ANN. Art. 5526, TEX. REV. CIV. STAT. ANN. Art. 2351½(c).

1. U.S. CONST. amend. XIV, §1 provides in pertinent part:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States

or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. TEX. CONST. Art. V, §18 provides:

Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge, as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

4. TEX. CONST. Art. V, §24 provides:

County Judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, official

misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

5. TEX. REV. CIV. STAT. ANN. Art. 5526 provides in pertinent part:

> There shall be comenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:
>
> 1. Actions of trespass for injury done to the estate or the property of another.
>
> 2. Actions for detaining the personal property of another, and for converting such property to one's own use.
>
> * * *
>
> 6. Action for injury done to the person of another.

6. TEX. REV. CIV. STAT. ANN. Art. 2351½(c) provides:

> When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice of the peace or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

STATEMENT OF THE CASE

Brunson D. Moore was duly reelected to the office of Justice of the Peace, Precinct 1, Place 1, El Paso County, Texas in the general election held on November 7, 1972. On December 21, 1972 he qualified for office by taking the required Oath, executing a Bond, and filing both instruments with the El Paso County Clerk.

On December 27, 1972 the Commissioners Court of El Paso County, Texas by majority vote abolished, effective December 31, 1972, all of the then existing Justice of the Peace and Constable Precincts numbered one through eight, and created six new precincts, effective January 1, 1973. The Commissioners Court, on the same day, entered its order that as of January 1, 1973, there would be vacancies in the newly created offices of Justice of the Peace and Constable. Judge Moore was not appointed to fill the vacancy created by the Commissioners.

Petitioner challenged the Commissioners' action in the United States District Court for the Western District of Texas in *Brunson D. Moore v. El Paso County Commissioners Court; Udell Moore, Individually and as County Judge of El Paso County; Richard Telles, Individually and as a Member of the El Paso County Commissioners Court; Rogelio Sanchez, Individually and as a Member of the El Paso County Commissioners Court; Sam Blackham, Individually and as a Member of the El Paso County Commissioners Court; Clyde Anderson, Individually and as a Member of the El Paso County Commissioners Court,* EP-74-272. He alleged that the actions of the Commissioners Court had (1) prevented him from carrying out the duties of Justice of the Peace, Precinct 1, Place 1, an office to which he had been duly elected, and (2) deprived him from receiving the emoluments of such office. The state

constitutional and statutory authority for the Commissioners' action, TEX. CONST. Art. V, §18 and TEX. REV. CIV. STAT. ANN. Art. 2351½(c), were alleged to be unconstitutional on their face and in violation of the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Reinstatement, all emoluments of office, including past salary, and injunctive relief were sought.

On February 18, 1975 the United States Supreme Court rendered its decision in *Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1975). This suit involved one Richard E. Moore who, like the Petitioner herein, was an elected official subjected to a redistricting plan. The Supreme Court's holding invoked the doctrine of abstention, and directed the District Court to dismiss the complaint without prejudice. The Harris County case is remarkably similar to the case at hand, involving a challenge, on federal constitutional grounds, of the State law which permitted both the El Paso and Harris redistricting plans.

On March 12, 1975, the Commissioners moved the Court to dismiss Civil Action Number EP-74-CA-272 on the basis of the abstention doctrine:

> Defendants move the Court to dismiss the complaint on the ground that Plaintiff's right to relief depends solely on State law; a similar petition has been filed by Plaintiff in State Court containing the same questions of law and fact as the complaint filed in this cause; and the Court should not exercise its jurisdiction to enjoin enforcement of Texas statutes and the Texas Constitution because they have not been authoritatively construed by the courts of the State of Texas. (App. E, *infra* at A14.)

On March 25, 1975, the motion was heard, and, "it appearing to the Court that it should abstain from the issues involved herein," the cause was dismissed without prejudice against Plaintiff (App. F, *infra* at A16).

Brunson D. Moore then pursued his claim in the Texas courts. The Honorable Hans E. Brockmoller, Judge, 120th Judicial District Court, denied Plaintiff's motion for summary judgment and granted Defendants' motion for summary judgment. The El Paso Court of Civil Appeals affirmed in *Moore v. El Paso County Commissioners Court*, 567 S.W. 2d 15, 16 (Tex. Civ. App.—El Paso, 1978, writ ref. n.r.e.). The Texas Supreme Court refused the application for writ of error on October 11, 1978 and Moore refiled his cause in federal court on December 11, 1978. The second federal suit was styled *Brunson D. Moore v. El Paso County, Texas; T. Udell Moore, Individually and in His Capacity as a Member of the Commisisoners Court of El Paso County, Texas; Clyde Anderson, Individually and in His Capacity as a Member of the Commissioners Court of El Paso County, Texas; Sam Blackham, Individually and in His Capacity as a Member of the Commissioners Court of El Paso County, Texas; Chuck Mattox, Individually and Through his Predecessor in Office Sam Blackham and in His Capacity as a Member of the Commissioners Court of El Paso County, Texas; Richard Telles, Individually and in His Capacity as a Member of the Commissioners Court of El Paso County, Texas; and Rogelio Sanchez, Individually and in His Capacity as a Member of the Commissioners Court of El Paso County, Texas*, numbered EP-78-CA-256.

Petitioner alleged that the prior dismissal without prejudice by the United States District Court had been ordered in compliance with the holding in *Harris County Commissioners Court v. Moore, supra*, and that relief then had been unsuccessfully sought in the 120th Judicial District Court of

El Paso County, Texas, the Court of Appeals for the Eighth Supreme Judicial District (El Paso), and the Texas Supreme Court. He further alleged that violations of the Fourteenth Amendment to the Constitution of the United States had occurred in his wrongful removal from office. The present action was brought under 42 U.S.C. §1983 and the Fourteenth Amendment. The District Court had jurisdiction under 28 U.S.C. §§1331, 1343.

On February 15, 1980, the Honorable Lucius D. Bunton, United States District Judge, entered his Order granting Defendants' Motion to Dismiss Plaintiff's Original Complaint for the reasons that said complaint was barred by the statute of limitations and by the doctrine of res judicata (App. D, *infra* at A13). No memorandum opinion was drafted.

The Fifth Circuit confined its opinion to the application of the Texas two year statute of limitations, TEX. REV. CIV. STAT. ANN. Art. 5526, to Judge Moore's second federal suit. The other point argued by the parties on appeal was whether Moore had "freely and without reservation litigagate[d] his federal claims in the state courts so that any subsequent action would be barred by the doctrine of res judicata." *Moore v. El Paso County*, 660 F. 2d 586, 588 (5th Cir. 1981). The parties concentrated their efforts on this second point, agreeing that *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) (hereinafter also referred to as "*England*") was of primary importance. This issue, however, was not reached by the Fifth Circuit because of its determination of the limitations issue.

REASONS FOR GRANTING THE PETITION

The abstention doctrine, and its unique application to Texas cases, form the basis of this Petition. Texas abstention cases, as the Court is aware, have had a procedural variation grafted upon them for several years by the Supreme Court and the Fifth Circuit. This procedure originally was implemented to facilitate the policies underlying abstention in the context of Texas practice. In the case at hand the lower courts have carried a procedural distinction to an extreme which has eroded substantive rights. The abstention doctrine has been compromised and the protections set out in *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975) have been violated.

I.

The purpose of the abstention doctrine, as announced in *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), is to avoid the premature or unnecessary determination of a federal question when the case may be decided upon an unsettled state law question. A federal court, accordingly, should refrain from deciding a case, and first allow the state courts to act. The normal practice requires the federal forum not to dismiss the suit, but to stay the federal proceedings while awaiting the outcome of the state action. In virtually all cases except those arising in Texas, the federal court retains jurisdiction. *Zwickler v. Koota*, 389 U.S. 241 (1967); *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 512-513 (1972); *American Trial Lawyers Assn. v. New Jersey Supreme Court*, 409 U.S. 467 (1973).

The retention of jurisdiction, however, is contrary to the Texas prohibition against advisory opinions. In *United Services Life Ins. Co. v. Delaney*, 396 S.W. 2d 855 (Tex.

1965), the Texas Supreme Court, after having examined the state constitution, the Texas Declaratory Judgment Act (TEX. REV. CIV. STAT. ANN. Art. 2524-1), and the abstention doctrine, determined that a reservation of jurisdiction by a federal court would cause any state court opinion to be advisory in nature and violative of the state constitution.

The procedural history of *United Services Life Ins. Co. v. Delaney, supra,* is somewhat convoluted in that it was referred to the state court system by a federal appellate court. The Texas Supreme Court made its decision after the Fifth Circuit had stayed proceedings on appeal and directed the parties to seek a state interpretation of state law. *United Services Life Ins. Co. v. Delaney,* 328 F. 2d 483, 484-85 (5th Cir. 1964). The Fifth Circuit finally decided the case on the merits after the Texas Supreme Court declined to interpret the state law in question. *United Services Life Ins. Co. v. Delaney,* 358 F. 2d 714 (5th Cir. 1966).

In any event, the Texas Supreme Court's holding subsequently was honored in *Barrett v. Atlantic Richfield Co.,* 444 F. 2d 38, 46 (5th Cir. 1971):

> The Texas Supreme Court's opinion in *Delaney* makes it abundantly clear that in order for the parties to be able to obtain adjudication of their relative property rights in a Texas court, the federal district court must not retain jurisdiction in this case.

The Fifth Circuit settled upon dismissal without prejudice as the appropriate way to satisfy the Texas prohibition, yet allow the federal courts to ultimately exercise their jurisdiction. *Id.* at 46; *Romero v. Coldwell,* 455 F. 2d 1163, 1167 (5th Cir. 1972); *Abell v. Frank,* 625 F. 2d 653, 658 (5th Cir. 1980); *Palmer v. Jackson,* 617 F. 2d 424, 431 n. 11 (5th Cir. 1980).

The events surrounding the *Delaney* litigation gave birth to the Texas exception of dismissal without prejudice in abstention cases. Judge Wisdom later wrote in *Barrett v. Atlantic Richfield Co., supra* at 45, that the exception was the result of "[a] well-intentioned, but unfortunate decision of this Court," and that the better practice might well have been to retain jurisdiction. Nonetheless, the Texas exception was adopted, and the Supreme Court must now revise a draconian result of its application.

II.

Dismissal without prejudice should not be permitted to result in the compromise of federally protected rights. Sight must not be lost of the exclusive purpose for employing dismissal without prejudice in an abstention case: to obtain a state interpretation of state law. After the timely filing of the initial federal action, no purpose, either state or federal, is served by penalizing a litigant because deferral to the state was deemed necessary. The courts below have penalized Petitioner and a writ of certiorari should be granted to correct this action.

Pullman abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise." *Harrison v. NAACP*, 360 U.S. 167, 175 (1959); *England v. Louisiana State Bd. of Medical Examiners, supra* at 416; *American Trial Lawyers Assn. v. New Jersey Supreme Court, supra* at 469.

The eventual exercise of federal jurisdiction pervades the abstention doctrine. The use of the state forums "as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *England, supra* at 465. The federal courts "do not decide questions of constitutionality on the basis of preliminary guesses regarding local law," *Spector Motor*

Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944), but neither do they avoid cases which have properly invoked federal jurisdiction. As the Supreme Court long ago held in *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1908) "the right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

The unique practice of dismissal without prejudice which has developed in regard to Texas abstention cases should not work a contrary result. The courts of the United States, in a variety of decisions, have expressly protected the litigant who wishes to return to the federal forum.

England dealt with the circumstances under which a party could be said to have waived the right to return to federal court. The language employed by Mr. Justice Brennan is unequivocal and is applicable to all abstention cases, including those arising in Texas:

> [T]he litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts. *England, supra* at 468.

The absolute right to return to the federal forum was stressed again in *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975) (hereinafter also referred to as *Harris County*). Mr. Justice Marshall recognized that the Texas courts prohibited declaratory relief under state law if a federal court retained jurisdiction. The ordinary course of retaining jurisdiction but staying the federal suit was abandoned. Dismissal without prejudice, previously ordered by the Fifth Circuit in *Barrett v. Atlantic Richfield Co., supra*, and *Romero v. Coldwell, supra*, was adopted by the Supreme Court. The procedure was man-

dated "solely in order to avoid the possibility that some state-law remedies might otherwise be foreclosed. . ." *Harris County, supra* at 89, n. 14. Dismissal was to have no effect on any subsequent federal filing:

> Obviously, the dismissal must not be used as a means to defeat the appellees' federal claims if and when they return to federal court. *Id.*

In the case at hand, the Fifth Circuit has ignored the holdings of abstention cases in general, and *Harris County* in particular. An analysis of this latter case establishes Petitioner's right to seek redress before the United States District Court for the Western District of Texas.

The Harris County Commissioners, acting under a state constitutional provision to permit revision of the precincts "for the convenience of the people", TEX CONST. Art. V, §18, and, under the statutory authority to fill vacancies caused by such revision, TEX. REV. CIV. STAT. ANN. Art. 2351½(c), adopted a redistricting plan and appointed persons to serve in the newly created offices. This action caused three justices of the peace and two constables to be ousted from office because several precincts were consolidated. Suit was brought to enjoin implementation of the plan. A three-judge court enjoined the redistricting, finding that the State statute denied equal protection to both the officeholders and the voters.

The Supreme Court reversed and remanded with instructions to dismiss the complaint without prejudice. The Court, as noted above, made reference to *Pullman*, and found that there existed an "uncertain status of law" between the Texas Constitution and a civil statute. The statute provides:

> When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new

> precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice of the peace or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant. TEX. REV. CIV. STAT. ANN. Art. 2351½(c).

The Texas Constitution provides that a justice of the peace or a constable "shall hold his office for four years and until his successor shall be elected and qualified." TEX. CONST. Art. V, §18. These officials may be removed for specific causes. TEX. CONST. Art. V, §24. Mr. Justice Marshall, writing for the majority, stated that:

> What is unsettled is whether these two provisions ensure justices and constables tenure until the completion of their elected terms even when midterm redistricting places them outside their original precinct or puts them into a precinct that has more than its full complement of officeholders. *Harris County, supra* at 85.

The same constitutional and statutory provisions were at issue in Petitioner's original federal action, and abstention was ordered (App. F, *infra* at A16).

In dismissing the suit in *Harris County*, the Supreme Court was expressly fashioning a solution for a Texas case, and in so doing, did not intend for any federally protected

rights to be abandoned. Dismissal without prejudice was referred to by the Court as an "unusual course" adopted only to allow the pursuit of state-law interpretation. *Harris County, supra* at 88, fn. 4. Professor Moore has stated that the sole reason for the Texas exception is to "facilitate state court resolution of the state issues," 1A MOORE'S FEDERAL PRACTICE, ¶0.023[1] at 2116 (1979), and that dismissal without prejudice is "a slight modification in the *England* procedure." *Id.* This comment parallels the views of other commentators that the Texas exception is a "purely formal difference" in contrast with the retention of jurisdiction. C. WRIGHT, A. MILLER & E. COOPER, 17 FEDERAL PRACTICE & PROCEDURE, §4243 at 473 (1978).

III.

The Fifth Circuit has focused its attention on the exception for Texas cases to such an extent that it has excluded consideration of abstention doctrine itself. The courts below have taken the position that because dismissal without prejudice is the appropriate procedure for Texas cases, it then must follow that the state statute of limitations is applicable to any refiling in federal court. This artificial construct goes on to require, in the case at bar, that only a tolling rule will allow Petitioner to return to the federal forum. The timely filing of the initial federal suit in 1974, according to this view, really did not have a lasting effect on Petitioner's claim. It served to only freeze the amount of time left at filing within which to return to the federal forum.

In any other American jurisdiction the original filing would have forever satisfied any limitations question, but in Texas, Petitioner was faced with the requirement of multiple federal filings. Unlike other litigants, a Texas abstention plaintiff is required to refile his suit in the

federal forum. In and of itself this would not be an onerous requirement if the second filing were permitted without regard to the statute of limitations. The Fifth Circuit, however, treats the second filing as being tantamount to an independent act. The statute may have tolled for the amount of time it took to traverse the state court system, but once the state supreme court has rendered a final judgment the only time remaining within which to return to federal court is the time which remained at the initial filing. A litigant who files his first federal suit at the close of the applicable limitations period must move with extreme dispatch in order to file his second suit. In some cases it may well be impossible to learn of the final state court judgment and return to federal court within the allotted time.

The Fifth Circuit recognized the severity of this application of the statute of limitations and stated that "[t]he possibility exists that the federal courts could create a tolling rule designed specifically to deal with the unique problems of *Pullman* abstention in the context of Texas cases." *Moore v. El Paso County, supra* at 59. Petitioner, according to the court, did not suggest such a rule, and the Texas two year statute of limitations was held to be applicable. *Id.* See also TEX REV. CIV. STAT. ANN. Art. 5526. Petitioner then sought to craft such a rule within these strictures, but his petition for rehearing was denied (App. C, *infra* at A12).

Petitioner respectfully submits that he always has urged that *Harris County, England* and the policies underlying the abstention doctrine require that he be allowed to return to the federal forum. A tolling rule is necessary only if it is assumed that the state statute of limitations continues to be relevant after the initial federal filing. This is not a factor in any federal court other than

those sitting in Texas. It should not be a factor in Texas. The Supreme Court in applying state-imposed limitations has written that, "although state law is our primary guide in this area, it is not, to be sure, our exclusive guide," *Johnson v. REA*, 421 U.S. 454, 465 (1975), and, further, that state law may be rejected if "unreasonable or otherwise inconsistent" with national policy, *United Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 706 (1966).

Petitioner, in this regard, is not arguing that the state statutes of limitation should be uniform throughout the United States. *Robertson v. Wegmann*, 436 U.S. 584, 594 n. 11 (1978). He is saying, rather, that once suit is timely filed in federal court under the appropriate state statute, all litigants should continue to have a unifrom right to return to the federal judiciary.

It has been the position of Petitioner throughout this litigation that the abstention doctrine admits to no restriction upon the return to federal court other than waiver. Reference to the statute of limitations is not necessary when returning to federal court. Petitioner has emphasized the initial federal filing because it was at that point federal jurisdiction was properly invoked. From that moment on, the cause became a federal matter—a matter which was interrupted, not by any act of Petitioner, but by a competing federal concern.

Abstention, the "time-honored canon of constitutional adjudication," *Spector Motor Service, Inc. v. McLaughlin, supra* at 105, was never intended to deny the federal courts jurisdiction over federal questions. It contemplates only that unsettled state law may be decided by the states "preliminary to a federal court's consideration of the underlying federal constitutional questions." *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 640 (1959). It is the duty of the federal courts to take jurisdiction of federal claims. *Cohens v. Virginia*, 6 Wheat. 264 (1821).

Petitioner has attempted to litigate his claim in federal court for well over seven years. The roots of the abstention doctrine may be traced to the courts of equity, and this fact was recognized by Mr. Justice Frankfurter in expressing the need for abstention in *Pullman, supra* at 500. See also Note, 73 Harv. L. Rev. 1358 (1960). The resources of the federal courts must now be equal to permitting Petitioner to return to the forum of his initial choice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Edward W. Dunbar, as counsel for Petitioner and a member of the Bar of the Supreme Court, hereby certify that three true and correct copies of the above and foregoing Petition for Writ of Certiorari have been served upon Michael P. Davis, Assistant County Attorney, El Paso County Attorney's Office, El Paso City-County Building, El Paso, Texas 79901 in accordance with Rule 33 of the Supreme Court Rules, by placing such copies in the United States Mail. All parties required to be served have been served.

EDWARD W. DUNBAR
1808 State National Plaza
El Paso, Texas 79901
915/532-3638

Appendix

APPENDIX

APPENDIX A

(Filed January 7, 1982)

Brunson D. MOORE,
Plaintiff-Appellant,

v.

EL PASO COUNTY, TEXAS, T. Udell Moore, etc., et al.,
Defendants-Appellees.

No. 80-1300.

United States Court of Appeals,
Fifth Circuit.

Unit A

Nov. 5, 1981.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, WISDOM and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

The plaintiff, Brunson D. Moore, appeals from the dismissal of his § 1983 suit by the district court. Because we think that Moore's suit is barred by the applicable statute of limitations, we affirm the judgment of the district court.

The Facts

Moore is a former Justice of the Peace in El Paso County, Texas. On Nov. 7, 1972, he was reelected for a four year term of office as Justice of the Peace for Precinct One, Place 1 of El Paso County, his term to commence January 1, 1973. However, on December 27, 1972, the Commissioners Court of El Paso County voted to abolish the eight existing Justice of the Peace and Constable Precincts effective December 31, 1972, and replace them with six new precincts, effective January 1, 1973. The Commissioners Court interpreted the statute giving them authority to redistrict to mean that there would be vacancies for Constable and Justice of the Peace in all six new districts as of January 1, 1973. They subsequently made appointments to fill the vacancies; Judge Moore was not appointed to a vacancy.[1]

On December 31, 1974, Judge Moore brought two actions against the El Paso County Commissioners Court and its members. One of these actions was brought in the 120th District Court of El Paso County, Texas. The other was filed in the United States District Court for the West-

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1. It appears that the action of the Commissioners Court came as no surprise to Judge Moore. According to the record, five months previously, on July 24, 1972, the Commissioners Court had considered redistricting and had voted 3-2 in favor, the 2-2 tie among the four Commissioners being broken by Judge T. Udell Moore, the County Judge (not to be confused with the appellant, Judge Brunson Moore). This redistricting was to take effect on August 1, 1972, and would have replaced the eight Justice of the Peace and Constable Districts with five. On July 27, Judge Brunson Moore, joined by four other Justices of the Peace, sought and obtained a Temporary Restraining Order against the redistricting. This Order expired on August 14, 1972, and since no further action was taken, the case was dismissed on November 4, 1972. A month later, on December 2, 1972, the Commissioners Court again took up the matter of redistricting by holding hearings which ultimately led up to its December 27 resolution.

ern District of Texas.[2] Except for a statement citing the basis of federal jurisdiction in the federal action, the pleadings are identical in content. Moore claimed that provisions of the Texas constitution and statutory law relied on by the Commissioners Court in their redistricting and appointments violated the Fourteenth Amendment both facially and as applied by the Commissioners Court.

Moore took no further steps in his state court action but went forward with his suit in federal district court. However, on February 18, 1975, the Supreme Court decided *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975), dealing with the same Texas constitutional and statutory provisions attacked in the present case. The Court held that Texas law was ambiguous and directed the court to abstain from passing on the federal constitutional issues under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Because of the niceties of Texas constitutional law, discussed more fully *infra*, the Supreme Court directed that the plaintiffs' action in federal court be dismissed without prejudice, thus enabling the plaintiffs to return to federal court once the state law had been clarified.

In the light of *Harris County Commissioners Court v. Moore*, the El Paso County Commissioners Court moved for dismissal on the basis of abstention. The district court granted the motion and the case was dismissed without prejudice on March 25, 1975.

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2. The record is ambiguous as to which action was filed first. Counsel for Appellant Moore stated at oral argument that the actions were filed "literally within hours of each other" and that he believed the federal action had been filed first. He explained that the duplicate filing was to prevent statute of limitations problems should one or the other of the actions be dismissed for any reason.

Since Moore already had a state court action pending, he used it to litigate his state law claims as required by *Pullman*. Summary judgment was granted for the defendant Commissioners in the trial court, and the decision was affirmed by the El Paso Court of Civil Appeals, 567 S.W.2d 15 (Tex.Civ.App.—El Paso 1978, writ ref. n. r. e.). The Texas Supreme Court refused the writ of error on October 11, 1978, and Moore filed the present action in federal court on December 11, 1978. Defendants moved for summary judgment on the grounds that the complaint was barred by the statute of limitations and res judicata. The district court granted defendants' motion on February 15, 1980. Moore appealed to this court.

The parties raised two basic issues on appeal: (1) was Moore's second federal suit barred by the statute of limitations, and (2) if not, did Moore freely and without reservation litigate his federal claims in the state courts so that any subsequent action would be barred by the doctrine of res judicata? We do not reach the second issue because of our determination of the first.

Statute of Limitations

[1, 2] In the traditional *Pullman* abstention case, a federal court will retain jurisdiction while the parties litigate the state law issues in the state courts. *Harris County Commissioners Court v. Moore, supra,* 420 U.S. at 88 n.4, 95 S.Ct. at 878 n.14; *Zwickler v. Koota,* 389 U.S. 241, 244 n.14, 88 S.Ct. 391, 393, 19 L.Ed.2d 444 (1967). However, the Texas courts have made clear that they cannot entertain a declaratory judgment proceeding while the federal court retains jurisdiction in the same controversy; the federal court's continuing jurisdiction to enter a final judgment has been interpreted by the Texas courts as precluding the state court from entering a final judgment it-

self. This renders any state court decision in such circumstances as advisory, and in violation of the Texas constitution's prohibition against advisory opinions. *United Services Life Ins. Co. v. Delaney*, 396 S.W.2d 855 (Tex.1965); *see Romero v. Coldwell*, 455 F.2d 1163 (5th Cir. 1972); *Barrett v. Atlantic Richfield Co.*, 444 F.2d 38 (5th Cir. 1971).

In order to ensure the sequence of events contemplated by the abstention doctrine, it is thus necessary in such cases to dismiss the federal action without prejudice. *Moore, supra; Abell v. Frank*, 625 F.2d 653 (5th Cir. 1980); *Ibarra v. Bexar County Hospital Dist.*, 624 F.2d 44 (5th Cir. 1980); *Romero v. Coldwell, supra; Barrett v. Atlantic Richfield Co., supra.* However, this procedure raises an interesting problem. The second federal action was filed on December 11, 1978, almost six years after the events of which Moore complains. Defendants argue that since the federal court did not retain jurisdiction, but required Moore to file a new action subsequent to the state court proceedings, the second federal action is barred by the statute of limitations. Moore argues in reply that the statute of limitations on the federal action should be tolled pending the outcome of the state litigation required by *Pullman.* In order to decide the issue we must look to the applicable law regarding the statute of limitations.

Moore brought the present action under 42 U.S.C. § 1983 and the Fourteenth Amendment. Where, as in this case, Congress has not established a statute of limitations or a body of tolling rules for a federally created cause of action, federal courts have "borrowed" the state law of limitations governing an analgous cause of action. *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454,

462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975). With respect to § 1983 actions, 42 U.S.C. § 1988 (1976) instructs the federal courts to refer to state statutes when federal law provides no rule of decision. *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978).

Robertson and *Johnson* direct us to ascertain the most appropriate and analogous Texas statute of limitations and tolling rules and to apply them unless we find them inconsistent with the federal Constitution or laws or with some important federal policy underlying the Constitution or laws. *See Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981).

[3-5] This circuit has recently held on the facts of a particular § 1983 action that the applicable Texas statute of limitations is Tex.Rev.Civ.Stat.Ann. Title 91, article 5526 (Vernon), which permits a period of two years in which suit is to be brought.[3] *Braden v. Texas A&M University System*, 636 F.2d 90 (5th Cir. 1981). Moore's pleadings allege that he was denied a property interest (his position and its emoluments) without due process of law. Therefore, as in *Braden*, we invoke article 5526(1), applicable to actions for trespass to property, and article 5526(2), applicable to actions for detaining property and for conversion, as the appropriate statutes of limitations in Moore's

---

3. Tex.Rev.Civ.Stat.Ann. Title 91, article 5526 (Vernon) provides in pertinent part:

> There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:
>
> 1. Actions of trespass for injury done to the estate or the property of another.
>
> 2. Actions for detaining the personal property of another, and for converting such property to one's own use.
>
> . . . .
>
> 6. Action for injury done to the person of another.

§ 1983 action. 636 F.2d at 93. Then absent any tolling period, the statute of limitations for Moore's § 1983 action should have run on or before January 1, 1975.[4]

Moore's second federal suit was filed on December 11, 1978, two months after the Texas Supreme Court denied a writ or error on Moore's state court action and almost six years after the cause of action had accrued. Moore admits that ordinarily his second suit would be barred by the statute of limitations, but in the light of the special circumstances of this case he asks us to fashion a tolling rule for *Pullman* situations in the Texas courts.

Two different tolling rules suggest themselves—one derived from Texas state law and a second proposed by Moore. Under each of the rules the statute would be tolled until the date on which Moore's state litigation was

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4. Although the statute of limitations and tolling provisions are governed by Texas law, when the cause of action accrues in a § 1983 suit is a question of federal law. *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981); *Lavellee v. Listi*, 611 F.2d 1129 (5th Cir. 1980); *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). Moore's § 1983 action could have accrued on December 27, 1972, when the Commissioners Court voted to redistrict, or on January 1, 1973, when Moore was relieved of his position as Justice of Peace. Moore filed his first district court action on December 31, 1974. If the earlier date applied, the action would have been filed more than two years from the time of accrual, and defendants have argued for this position. Defendants, however, did not plead a statute of limitations defense either to Moore's first federal action or to the state action filed simultaneously with it. Indeed, they have raised the point concerning the original federal action for the first time on this appeal to the second federal action. It is much too late for such objections—defendants have waived this affirmative defense with respect to the first action. Fed.R.Civ.P. 8(c); *Moore v. Tangipahoa Parish Sch. Bd.*, 594 F.2d 489 (5th Cir. 1979). Since the choice of December 27 or January 1 as the time of accrual makes no difference to our subsequent holding as regards the second federal suit, we do not decide the question. It is sufficient for us to say only that the cause of action had accrued on or before January 1, 1973.

concluded. However, each rule gives a different starting point for when the tolling would begin.

As a general rule we would look initially to the law of the State of Texas for a tolling exception which would benefit Moore. *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). Texas does have a tolling rule which might conceivably be appropriate to a *Pullman-England* situation, where a federal plaintiff is prevented from raising particular claims in federal court by the pendency of state proceedings.[5] Under this rule, the statute would be tolled from the time the state proceedings required by *Pullman* were commenced until their conclusion.

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5. The courts of Texas have held that

> [a]s a general rule, where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right. *Cavitt v. Amsler*, 242 S.W. 246, 249 (Tex.Civ.App.—Austin 1922, writ dism'd).

Walker v. Hanes, 570 S.W.2d 534 (Tex.Civ.App.—Corpus Christi 1978, writ ref. n. r. e.); *see First Natl. Bank v. NuWay Transports, Inc.*, 585 S.W.2d 813 (Tex.Civ.App.—Fort Worth 1979, no writ); *Fields v. Austin*, 30 S.W. 386 (Tex.Civ.App. 1895, writ den. err ref.). This rule has been applied in cases where a plaintiff's rights are not determined until a pending litigation is completed. *See, e. g., McDonald v. Ayres*, 269 S.W. 1105 (Tex.Ct.Civ.App.—Galveston 1925, no writ) (statute did not run on plaintiff's suit for interest on note until it had been determined in another proceeding that he owned a one-half interest in note). This state of affairs is analogous to the *Pullman* situation, where the plaintiff cannot be sure that the state law in question violates his federal constitutional rights until a state court has construed the law.

The analogy to the *Pullman* situation is not perfect since the plaintiff is not completely prevented from litigating his federal claims pending the outcome of the state law issues. He may of course litigate both together. However, this forfeits his right to a federal forum and defeats the purposes behind *Pullman* abstention, for abstention is meant to be only a temporary and not a permanent abdication of federal jurisdiction. The tolling rule may thus be the most appropriate and analogous one.

Moore proposes a different tolling exception. Under his rule the federal court would toll the statute from the time that the first federal action was dismissed until the time that the state proceedings were completed, thus avoiding the possibility that the statute might run between the time of the dismissal and the institution of the state suit.[6]

Although a tolling rule in *Pullman* situations like this one has obvious merits,[7] neither the state rule nor Moore's proposed rule would held Moore on the facts of this case. Even were we to choose one of these rules, Moore's second federal action would be barred. Moore's state suit and his first federal suit were filed with at most one day to

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6. Because in this case Moore's state and first federal suit were filed simultaneously, the period provided by the Texas common law tolling period would actually be longer; but in most situations where plaintiff's counsel is not so prescient, the state action would usually be filed subsequent to dismissal and so the state rule would offer less protection.

7. Such a rule would vindicate the important federal policies underlying both *Pullman* and *England v. Louisiana Board of State Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). Under *England* the federal plaintiff has the right to have his federal claims eventually heard in the federal courts, his original forum of choice. But he must not litigate his claims in the state courts if he wishes to preserve that right. If a federal court relinquishes its jurisdiction in a *Pullman* situation in accordance with *Moore*, it is very possible, and indeed very likely, that the length of subsequent state law litigation will exceed the time remaining on the statute of limitations. This is especially so in actions alleging constitutional violations under 42 U.S.C. § 1983, for such suits brought in Texas will often have a statute of limitations of only two years. Absent a tolling rule, the federal plaintiff is then put to the unpleasant choice of either foregoing his right to a federal forum by litigating his federal claims in state court or hoping that the state litigation proves speedy and risking a complete forfeiture of his federal claims. The more complex the state issues, and the more successfully the defendants can engage in dilatory tactics, the more certain it is that the federal plaintiff will be robbed of the rights that *England* sought to preserve for him. Such a situation clearly does no justice to the policies which motivated the *Pullman* doctrine.

spare. Moore's state litigation was concluded on October 11, 1978, when the Texas Supreme Court denied his application for a writ of error.[8] Moore did not file his second federal suit until December 11, 1978. Thus under the Texas tolling rule, Moore's second federal suit was at least two months tardy. Ironically, under Moore's own proposed rule, his suit would be even later. The first federal suit was dismissed without prejudice on March 25, 1975, approximately three months after the statute had run. Thus under Moore's tolling rule his second suit would be a total of five months too late.

The possibility exists that the federal courts could create a tolling rule designed specifically to deal with the unique problems of *Pullman* abstention in the context of Texas cases. But Moore has not suggested any other rule for our consideration and we decline to speculate on what, if any, the proper rule would be. Of course any deviation form the Texas tolling rule would have to be justified under *Tomanio, Johnson v. Railway Express Agency* and *Robertson v. Wegmann* by showing that the Texas rule was inconsistent with the federal Constitution or laws or with a federal policy underlying them.

Because Moore's second suit is barred by the statute of limitations, the judgment of the district court dismissing Moore's second suit is affirmed.

AFFIRMED.

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8. We have taken judicial notice of the exact date of the denial of the writ of error, as the information was not included in the record or in the briefs submitted by the parties.

APPENDIX B

(Filed January 7, 1982)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-1300
D. C. Docket No. EP-78-CA-256

BRUNSON D. MOORE,
Plaintiff-Appellant,

versus

EL PASO COUNTY, TEXAS, T. UDELL MOORE, Etc., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before BROWN, WISDOM and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

November 5, 1981

ISSUED AS MANDATE: JAN 7 1982

APPENDIX C

(Filed January 7, 1982)

Brunson D. MOORE,
Plaintiff-Appellant,

v.

EL PASO COUNTY, TEXAS, T. Udell Moore, etc., et al.,
Defendants-Appellees.

No. 80-1300.
United States Court of Appeals,
Fifth Circuit.
Unit A
Dec. 28, 1981.

Appeal from the United States District Court for the Western District of Texas, Lucius Desha Bunton, Judge.

ON PETITION FOR REHEARING

(Opinion November 5, 1981, 5 Cir., 1981, 660 F.2d 586)

Before BROWN, WISDOM and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied. Appellant argues, for the first time in his petition for rehearing, that this court should adopt the functional view that when the initial federal action was filed on a timely basis, insofar as the Texas statute of limitations is concerned, the federal court need not thereafter concern itself with the statute of limitations. We do not consider arguments raised for the first time in a petition for rehearing.

APPENDIX D

(Filed February 19, 1980)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION
EP-78-CA-256

BRUNSON D. MOORE,
PLAINTIFF

vs.

EL PASO COUNTY, et al,
DEFENDANTS

ORDER

On February 13, 1980, came on to be heard the Defendants' Motion to Dismiss the Plaintiff's Original Complaint for the reasons that said complaint is barred by the statute of limitations and by the doctrine of res judicata.

The Court, after carefully considering the evidence, briefs and argument of counsel, is of the opinion that said motion is well-taken and accordingly,

IT IS ORDERED that the Defendants' Motion to Dismiss is hereby GRANTED.

Signed and entered this the 15th day of February, 1980.

/s/ Lucius D. Bunton
Lucius D. Bunton
United States District Judge

APPENDIX E

(Filed March 12, 1975)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION
CIVIL ACTION NO. EP-74-CA-272

BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas.
Plaintiff

vs.

EL PASO COUNTY COMMISSIONERS COURT, UDELL MOORE, Individually and as County Judge of El Paso County; RICHARD TELLES, Individually and as a Member of the El Paso County Commissioners Court; ROGELIO SANCHEZ, Individually and as a Member of the EL PASO COUNTY COMMISSIONERS COURT; SAM BLACKHAM, Individually and as a Member of the El Paso County Commissioners Court, CLYDE ANDERSON, Individually and as a Member of the El Paso County Commissioners Court.
Defendants

MOTION TO DISMISS

Defendants move the Court to dismiss the complaint on the ground that Plaintiffs right to relief depends solely on State law; a similar petition has been filed by Plaintiff in State Court containing the same questions of law and fact as the complaint filed in this cause; and the Court should not exercise its jurisdiction to enjoin enforcement of Texas statutes and the Texas Constitution because they

have not been authoritatively construed by the courts of the State of Texas.

/s/ George N. Rodriguez, Jr.
George N. Rodriguez, Jr.
Attorney for Defendants

I hereby certify that I have sent a copy of the foregoing motion to the Attorneys for the Plaintiffs by United States Mail on 12th day of March, 1975.

/s/ George N. Rodriguez, Jr.

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION
CIVIL ACTION NO. EP-74-CA-272

BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas.
Plaintiff

vs.

EL PASO COUNTY COMMISSIONERS COURT, UDELL MOORE, Individually and as County Judge of El Paso County; RICHARD TELLES, Individually and as a Member of the El Paso County Commissioners Court; ROGELIO SANCHEZ, Individually and as a Member of the EL PASO COUNTY COMMISSIONERS COURT; SAM BLACKHAM, Individually and as a Member of the El Paso County Commissioners Court; CLYDE ANDERSON, Individually and as a Member of the El Paso County Commissioners Court.
Defendants

ORDER

On this the 25th day of March 1975 came on to be heard Defendant's motion to dismiss the above entitled and numbered cause; and it appearing to the Court that it should abstain from the issues involved herein.

It is the Order of this Court that the above styled and numbered cause be dismissed without prejudice against Plaintiff.

Signed and entered this 25th day of March 1975.

/s/ William S. Sessions
Judge

Opposition

Office - Supreme Court, U.
FILED
JUL 2 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1808

In the Supreme Court of the United States

October Term, 1981

BRUNSON D. MOORE,
Petitioner,

vs.

EL PASO COUNTY, TEXAS, T. UDELL MOORE, etc., et al.,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorney for Respondents

R. L. Mimeographing, Inc., 925 Cherry Street, Kansas City, Mo. 64106, (816) 421-2020

QUESTIONS PRESENTED

Respondents object to the assumptions made in stating the questions presented. Petitioner states that the questions assume that the State determination did not resolve the controversy and claimant has returned to federal court. They further assume that the original federal suit was timely filed.

These assumptions are inaccurate and misleading. First the questions presented should assume that all claims were presented to the state courts and resolved. Second, the original federal suit was not timely filed. Third, the assumption must be made that Petitioner was dilatory in pursuing his claims in the original filings and in proceedings through the State system.

Therefore, based upon the foregoing assumptions the questions presented should be as follows:

1. May the refiling of the federal cause of action be barred by application of the state statute when the claimant has not vigorously pursued his state action?

2. Does the abstention doctrine as applied to Texas have an automatic tolling rule that allows claimant to return to the federal court any time, no matter how long after abstention is invoked?

3. May the return to the federal court be barred on any other grounds (i.e. res judicata) when claimant has presented his federal claims in state court or has not expressly reserved his federal claim?

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No. 81-1808

In the Supreme Court of the United States

October Term, 1981

BRUNSON D. MOORE,
Petitioner,

VS.

EL PASO COUNTY, TEXAS, T. UDELL MOORE, etc., et al.,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra* at A1) is reported at 660 F.2d 586 (5th Cir., 1981). The order of the district court (App. B, *infra* at A13) is not reported.

Petitioner has pursued the same cause of action on two separate occasions within the federal court system. The initial suit was dismissed without prejudice upon the motion of Respondents (App. C, *infra* at A14). The order granting this motion (App. D, *infra* at A16) is not reported.

Petitioner has also pursued this cause of action in three separate state court actions. The first action was brought in the 168th Judicial District Court of El Paso County, Texas (App. E, *infra* at A17). This cause was dismissed on November 4, 1977.

The second state cause of action was filed at the same time the original federal suit was brought (App. F, *infra* at A28). On April 4, 1977, the state court granted Respondents' motion for summary judgment (App. F, *infra* at A36). Petitioner appealed and the opinion of the Texas Court of Appeals is published at 567 S.W.2d 15 (Tex. Civ. App.-El Paso, 1978, writ ref'd n.r.e.).

The third state action was filed in 1977 and is still pending (App. G, *infra* at A38).

The initial federal cause of action and the second state court cause of action were brought by Petitioner two years and four days after the alleged wrong.

JURISDICTION

Respondents adopt Petitioner's statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, U. S. CONST. amend. XIV, §1; the Civil Rights Act of 1871, 42 U.S.C. §1983 provisions of the Texas Constitution, TEX. CONST. art. V, §18; Texas statutes, TEX. REV. CIV. STAT. ANN. art. 5526 (1982); and TEX. REV. CIV. STAT. ANN. art. 2351, §1 (1982).

1. U. S. CONST. amend. XIV, §1 provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U.S.C. §1983 provides in pertinent part:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. TEX. CONST. art. V, §18 provides:

Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each County shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge, as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. Misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

4. TEX. REV. CIV. STAT. ANN. art. 5526 (1982), provides in pertinent part:

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suit in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such property to one's own use.

5. TEX. REV. CIV. STAT. ANN. art. 2351, §1 (1971) provides in pertinent part:

Each Commissioner's Court shall:

1. Lay off their respective counties into precincts, not less than four, and not more than eight, for the election of justices of the peace and constables, fix the times and places of holding justice courts, and shall establish places in such precincts where elections shall be held; and shall establish justices precincts and justices courts for the unorganized counties as provided by law.

STATEMENT OF THE CASE

Respondents adopt Petitioner's Statement of the Case, however, would further show unto the court the following facts:

In 1972, the El Paso County Commissioner's Court undertook public hearings to determine whether the Justice of the Peace and Constable system then existing in El Paso County, Texas, was effective and responsive to the needs of the citizens of El Paso County and met the requirements of the one-man one-vote rule. The El Paso County Commissioner's Court was subsequently enjoined by the 168th Judicial District Court of El Paso County, Texas in an action brought by Petitioner and others (App. E, *infra* at A17). Said injunction was subsequently dis-

solved, and the Commissioner's Court resumed public hearings in accordance with the right of the people to alter or abolish an ineffective system of government. Petitioner received the majority of votes for the office of Justice of the Peace, Precinct 1, Place 1, El Paso County, Texas in the general election held on November 7, 1972. The term of said office did not commence to run until January 1, 1973.

During December 1972, the Commissioner's Court of El Paso County, Texas again undertook public hearings concerning the then existing Justice and Constable system. On December 27, 1972, the Commissioner's Court of El Paso County, Texas by a majority vote abolished, effective December 31, 1972 (the day before new terms were to commence), all of the then existing Justice of the Peace and Constable Precincts numbered one through eight, and created six new precincts, in accordance with Texas Law, effective January 1, 1973. The changes in these precincts were made pursuant to the following laws of the State of Texas: TEX. CONST. art. V, §18; TEX. REV. CIV. STAT. ANN. art. 2351, §1 (1982). The changes were not made in accordance with TEX. REV. CIV. STAT. ANN. art. 2351 1/2 (c) (1982). The Court on the same day entered its order appointing individuals to the newly created offices of Justice of the Peace and Constable. Petitioner was not appointed to a vacancy.

Two years and four days later, December 31, 1974, Petitioner filed an original Petition in the 120th District Court of El Paso County, Texas in cause number 75-5 (App. F, *infra* at A28). Petitioner then filed a complaint in the United States District Court for the Western District of Texas in cause number EP-74-CA-272 (App. H, *infra* A43).

These two petitions were almost identical, the exception was some boiler plate language required in the

federal court action as to jurisdiction. Both petitions state in relevant part:

> "These provisions as applied to support the order of Commissioners Court referred to above, are unconstitutional on their face and in violation of the privileges and immunities clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In the alternative, it is alleged that if not a violation of said, Fourteenth Amendment on their face, the order and said provisions of Texas Law are in violation of said Fourteenth Amendment as applied in the above referenced instance."

The defendants in both causes were the same: El Paso County Commissioner's Court: Udell Moore; Richard Telles; Rogelio Sanchez; Sam Blackham; and Clyde Anderson. All were named individually as well as a member of El Paso County Commissioner's Court.

The federal cause of action based jurisdiction on 28 U.S.C. §2281, and 28 U.S.C. §1331.

On March 25, 1975, the United States District Court entered an order of dismissal without prejudice, upon Respondents' motion to dismiss (App. D, *infra* at A16).

Two years later, on December 29, 1976, Respondents filed a plea in abatement and special exceptions to Petitioner's cause of action in the 120th Judicial District Court of El Paso County, Texas. Petitioner then amended his petition adding a registered voter, however, retaining the language set forth above in his original petitions.

On January 27, 1977, Respondents moved for summary judgment. Petitioner filed his motion for summary judgment and brief in support thereof February 23, 1977.

On April 4, 1977, the 120th District Court rendered its decision in favor of Respondents. Petitioner took exception to the judgment and appealed to the 8th Court of Appeals. *Moore v. El Paso County Commissioners Court*, 567 S.W.2d 15 (Tex. Civ. App.-El Paso 1978, writ ref'd n.r.e.).

On December 30, 1977, Petitioner filed suit in the 243rd Judicial District Court of El Paso County, Texas, in cause number 77-7644, said cause is still pending (App. G, *infra* at A38).

On March 29, 1978, the Court of Civil Appeals rendered its decision in *Moore v. El Paso County Commissioners Court*, 567 S.W.2d 15 (Tex. Civ. App.-El Paso, 1978, writ ref'd n.r.e.). Petitioner thereupon filed a motion for rehearing. Said motion was denied and Petitioner filed an Application for Writ of Error in the Supreme Court of the State of Texas. Said application was denied by the Texas Supreme Court on a finding of a no reversible error on October 11, 1978.

On December 11, 1978, Petitioner filed this cause of action now before the Court. In said cause Petitioner alleges for the first time a cause of action under 42 U.S.C. §1983, and attempts to invoke 42 U.S.C. §1988, although this section is not plead. Petitioner also names for the first time El Paso County and Chuck Mattox as new defendants.

REASONS FOR DENYING THE PETITION

Petitioner urges the Court grant this petition because the abstention doctrine as it applies to Texas "has been compromised and the protections set out in *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975) have been violated."

Respondents would respectfully urge that abstention doctrine has not been compromised. Further Petitioner has ignored the admonition of *Harris County Commissioners Court v. Moore, supra* at 83, by being dilatory in the pursuit of his state and federal actions.

I.

Petitioner's arguments as to tolling, abstention and what rule should apply in Texas totally ignore the reasons for imposing limitations on actions. The Fifth Circuit noted the instant federal action was brought more than six years after the alleged wrong. The cause of action now before the Court was brought pursuant to 42 U.S.C. §1983, and although not plead, apparently petitioner seeks attorney fees under 42 U.S.C. §1978. December 11, 1978, was the very first time these provisions were invoked. This action goes against every equitable and logical concept that stale claims should not be allowed to threaten or harass Respondents.

The law is well settled that where Congress has not established a statute of limitations or tolling rule for a federal cause of action the courts must look to state law. *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478 (1980); *Robertson v. Wegmann*, 436 U.S. 584 (1978).

Under Texas law the appropriate state statute is TEX. REV. CIV. STAT. ANN. art. 5526 (1982). *Braden v. Texas A & M University System*, 636 F.2d 90 (5th Cir. 1981). This statute provides for a two year period in which Petitioner must bring his action, unless tolled by some Texas tolling rule. The Fifth Circuit noted that Texas does have a general tolling rule which *might conceivably* apply in this type case. *Moore v. El Paso County, Texas*, 660 F.2d 586, 590, n.5 (5th Cir. 1981).

However, assuming; without admitting the statute of limitations was tolled during the pending of the state actions, Petitioner's action is still at least two months beyond the limitations period. *Id.*, at 590, n.4.

Respondents submit that the Petitioner lost sight of the Supreme Court admonition in *Harris County Commissioner's Court v. Moore*, 420 U.S. 77 (1975), that valuable federal rights might be lost in the absence of expeditious adjudication. *Id.* at 83. Petitioner was dilatory in bringing his original actions over two years after the alleged wrong and waiting two months after the state court action had ended before seeking to return to federal court.

It has always been the policy of the courts to encourage diligence in the assertion of demands and the prosecution of remedies, while frowning on dilatoriness and delay. This cause of action is directly in point with *Salmon v. Stuart*, 194 F.2d 1004 (5th Cir. 1952), wherein the Fifth Circuit affirmed a dismissal under Rule 41 (b), Fed. Rules of Civil Procedure, and said:

> When it comes to the merits, though, we think it plain that the order should be affirmed. Putting to one side that what is being litigated here is old straw which has been thrice threshed, or sought to be threshed,

> in the courts, it stands undisputed that following the filing of this, the third suit, no action was taken in it by the plaintiffs for one year and three months. *Id.*

Plaintiff has litigated this cause of action in four different suits. Further Plaintiff has failed to take any action in this suit, except that specifically ordered by the district court in the one year and two months the case was pending.

There is an old equity maxim that "equity aids the vigilant and not those who sleep on their rights." 35 TEX. JUR. 2d, *Laches and Stale Demands*, §2 (1964). The basis for the doctrine of laches is the principle that equity will not aid a plaintiff, whose unexpected delay, if suit were allowed would be prejudicial to defendants. *City of Fort Worth v. L. C. Johnson*, 388 S.W.2d 400 (Tex. 1964).

The two essential elements in the defense of laches are: (1) unreasonable delay by one having legal or equitable rights in asserting them; (2) good faith change of another to his detriment because of delay. See: *American Casualty and Life Insurance Company v. Parish*, 355 S.W.2d 781 (Tex. Civ. App.-Waco 1962), accord, *Westworth Village v. Mitchell*, 414 S.W.2d 59 (Tex. Civ. App.-Fort Worth 1967, reh. denied, err. ref'd n.r.e.). In *Refior v. Lansing Prop. Forge Co.*, 124 F.2d 440, 444 (6th Cir. 1942), the Court said that parties to a litigation are:

> "entitled to its prosecution with reasonable diligence and, where prejudice results to one party by failure on part of the party on who rests the burden of going forward with a cause within a reasonable time to bring right to move for dismissal, and actual injury may either be shown or inferred from lapse of time if the lapse is great." *Id.*

In *Refior, supra,* the delay was six years, while the delay in the instant case has been ten years.

The Respondents have been damaged by this delay. This unreasonable delay has caused the Respondents to change their position in good faith. Respondents' memories were reasonably accurate and reliable in regard to the case at bar ten years ago. Now, with the passage of time, Petitioner is relying on his memory alone. Furthermore, only one of the commissioners is still sitting on the Commissioners Court.

The reasoning of the laches doctrine is also the basis of imposing a limitation rule. Petitioner would argue that because he brought his original action within the proper time (although the Fifth Circuit has noted even the original action was barred, *Moore, supra* n.4 at 590), he can return to federal court at any time after litigating all his claims on state Court.

Petitioner proposes a rule that would eliminate foreever state statute of limitation rules in favor of an absolute right to return to the federal forum at his leisure. This rule would allow Plaintiffs to continually threaten and harass Defendants long after justice demands litigation should cease.

The rule is not necessary. Petitioner could have appealed to the United States Supreme Court from the Texas Supreme Court.

Both parties agree this cause of action is controlled by the Supreme Court's decision in *England v. Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964). It is the application of *England* to the procedural facts in this cause upon which the parties differ. Petitioner seeks to apply *England* in a broad manner to this cause, without considering the procedural facts and distinctions between

England and the instant cause. It is the failure of Petitioner to understand the importance of these procedural distinctions that is the basis of his position.

In *England* the Appellants originally brought their action in the United States District Court for the Eastern District of Louisiana, before any state litigation was commenced. The three judge court invoked the doctrine of abstention and stayed its proceedings. The Court entered an order:

> "Staying further proceedings in this Court until the Courts of the State of Louisiana shall have been afforded an opportunity to determine the issues here presented, and retaining jurisdiction to take such steps as may be necessary for the just disposition of the litigation should anything prevent a prompt state court determination," *England, supra* at 412.

Appellants *then* brought an action in the Louisiana Courts. It is clear in *England, supra,* that Appellants tried to reserve their federal claims in that they attached a copy of the federal court order, and "recited that the state proceeding was brought 'in pursuance of and obedience to' the abstention order." *England, supra* at 413, n.3. Despite this reservation, Appellants litigated, their claims because they felt the then existing law compelled them to litigate these matters. *England, supra* at 420.

The Supreme Court in *England* indicated that this mistaken belief that Appellants must litigate their federal claims was reasonable. Appellants, therefore, believing they were compelled to litigate these claims, could not be said to freely and unreservedly litigate their federal claims. The Court then holds others will not be able to rely upon this mistaken belief. *England, supra* at 422.

It is clear in the instant case that Petitioner freely sought to litigate his federal questions in the State Courts. Petitioner filed the same petition in the 120th Judicial District Court of El Paso County, Texas (App. F, *infra* at A28), prior to or at the same time he filed his petition in the United States District Court. Petitioner did not even attempt to make a reservation of his rights to litigate federal claims in federal court.

After the United States District Court abstained in this case, Petitioner approved the order, even though it made no mention of any right to return. Petitioner could have sought such expressed reservation as was given in *Harris County Commissioner's Court v. Moore*, 420 U.S. 77, 88 (1975). No such reservation was made or sought as was done in *American Trial Lawyers Association v. New Jersey Supreme Court*, 409 U.S. 467 (1973).

If there is an absolute right to return to the federal court as Petitioner implies, why would it be necessary for the Supreme Court to find a party had a right to have such reservation expressed in the trial court's order? *American Trial Lawyers, supra.* If one accepts Petitioner's view, the rule would be that the party against whom abstention is invoked would have to expressly state it waived the right to return to federal court in order for res judicata to be invoked. No party would do this on the chance they could litigate their claims in both forums.

Respondents believe that a long line of cases from the United States Court of Appeals, for the Fifth Circuit control this case. In particular Respondents contend that the holding in *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976), is on point.

In *Jennings* a teacher brought an action in the State Courts alleging a violation of her right under Civil Rights

Act of 1871. She then sought to litigate her claims in federal court. The District Court dismissed on the basis of res judicata. The Court affirmed, holding:

> "Under the doctrine of res judicata, the prior judgment of the state court is conclusive as to all matters which were or might have been litigated therein and bars a subsequent decision by the federal courts." *Jennings, supra,* 1331.

In *Jennings* the Appellant asserted she had been forced to bring her constitutional claims in state court. The Court answered this argument by citing *England, supra,* and noting:

> "had appellant wished to reserve her constitutional claims for subsequent litigation in federal court, she could have done so by making on the state court record a reservation to the disposition of the entire case by the state courts . . . Appellant expressed no reservation in State Court." *Jennings, supra* at 1332.

It is clear that the Fifth Circuit understands, as do Respondents, that a party must at least attempt to make some type of reservation of their federal claims. Petitioner made no such reservation when he filed in state court prior to the federal court's abstention *or* after that abstention. The express reservation must be made. *Palmer v. Jackson,* 617 F.2d 424, 432 (5th Cir. 1980).

Petitioner asserts that even if his claims were submitted to the state courts they did not rule on these claims and therefore he is entitled to have a federal court rule on his constitutional claims. This argument totally disregards the decision of the Texas Court of Civil Appeals in *Moore v. El Paso County Commissioners' Court, supra,* and is contrary to the dictates of *England, supra.*

The Court of Civil Appeals expressly found in its opinion in Petitioner's state case, that his cause of action must fail under the decision rendered in *Telles v. Sample*, 500 S.W.2d 677 (Tex. Civ. App.-El Paso, 1973, writ ref'd n.r.e.). Therefore, one must look to *Telles, supra*, to determine whether these constitutional issues were decided.

Telles is clear:

> "But we find no constitutional or statutory time limit on when the Commissioners Court may order a redistricting plan into effect." *Telles, supra* at 679.

It is clear that the Texas Courts expressly decided the constitutional issues in favor of Respondents. If Petitioner felt these decisions were wrong his appeal was to the United States Supreme Court.

Even if this Court finds the state courts did not adequately address the constitutional issues in their decisions, Petitioner cannot deny these issues were not submitted in his briefs, motion for rehearing, and application for writ of error. Therefore, by implication, if not expressly, the Courts choose to render their decisions on the federal question.

The Supreme Court in *England* held that it is the right of the State Courts to render:

> "a decision on the federal question if it chooses to do so; and even if such a decision is not explicit a holding that a statute is applicable may arguably imply, in view of the constitutional objections to such a construction, that the court considers the constitutional challenge to be without merit." *England, supra* at 421.

It is clear that Petitioner chose to present his federal claims in state court, presented those claims, and those

claims were decided. Now having lost his gamble, he comes back to federal court and says I really did not intend, in my mind, to litigate my federal questions. If the Court accepts Petitioner's argument it will open the doors to an unnecessary increase in the length and cost of litigation and would be a source of friction between the federal and state courts.

It is clear that even if Petitioner's return to federal court is not barred expressly by the statute of limitations it can be barred by other grounds.

CONCLUSION

The refiling of the federal cause of action may be barred by the state statute of limitations.

There is no tolling rule which should allow Petitioner to refile his federal claim in the instant case.

Petitioner's claims have been presented and resolved in state court and therefore are barred in a subsequent federal action.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL PATRICK DAVIS
201 City-County Bldg.
El Paso, Texas 79901
915/546-2055
Attorney for Respondents

CERTIFICATE OF SERVICE

I, MICHAEL PATRICK DAVIS, as Counsel of record for Respondents and a member of the Bar of the Supreme Court of the United States of America, hereby certify that three true and correct copies of the foregoing Response to the Petition for Writ of Certiorari have been served upon EDWARD W. DUNBAR, Esq. 1808 State National Plaza, El Paso, Texas 79901, in accordance with Rule 33 of the Supreme Court Rules, by placing such copies in the United States Mail. All Parties required to be served have been served.

MICHAEL PATRICK DAVIS
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El Paso, Texas 79901
915/546-2055

Appendix

APPENDIX

APPENDIX A

(Filed January 7, 1982)

Brunson D. MOORE,
Plaintiff-Appellant,

v.

EL PASO COUNTY, TEXAS, T. Udell Moore, etc., et al.,
Defendants-Appellees.

No. 80-1300.
United States Court of Appeals,
Fifth Circuit.
Unit A

Nov. 5, 1981.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, WISDOM and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

The plaintiff, Brunson D. Moore, appeals from the dismissal of his § 1983 suit by the district court. Because we think that Moore's suit is barred by the applicable statute of limitations, we affirm the judgment of the district court.

The Facts

Moore is a former Justice of the Peace in El Paso County, Texas. On Nov. 7, 1972, he was reelected for a four year term of office as Justice of the Peace for Precinct One, Place 1 of El Paso County, his term to commence January 1, 1973. However, on December 27, 1972, the Commissioners Court of El Paso County voted to abolish the eight existing Justice of the Peace and Constable Precincts effective December 31, 1972, and replace them with six new precincts, effective January 1, 1973. The Commissioners Court interpreted the statute giving them authority to redistrict to mean that there would be vacancies for Constable and Justice of the Peace in all six new districts as of January 1, 1973. They subsequently made appointments to fill the vacancies; Judge Moore was not appointed to a vacancy.[1]

On December 31, 1974, Judge Moore brought two actions against the El Paso County Commissioners Court and its members. One of these actions was brought in the 120th District Court of El Paso County, Texas. The other was filed in the United States District Court for the West-

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1. It appears that the action of the Commissioners Court came as no surprise to Judge Moore. According to the record, five months previously, on July 24, 1972, the Commissioners Court had considered redistricting and had voted 3-2 in favor, the 2-2 tie among the four Commissioners being broken by Judge T. Udell Moore, the County Judge (not to be confused with the appellant, Judge Brunson Moore). This redistricting was to take effect on August 1, 1972, and would have replaced the eight Justice of the Peace and Constable Districts with five. On July 27, Judge Brunson Moore, joined by four other Justices of the Peace, sought and obtained a Temporary Restraining Order against the redistricting. This Order expired on August 14, 1972, and since no further action was taken, the case was dismissed on November 4, 1972. A month later, on December 2, 1972, the Commissioners Court again took up the matter of redistricting by holding hearings which ultimately led up to its December 27 resolution.

ern District of Texas.[2] Except for a statement citing the basis of federal jurisdiction in the federal action, the pleadings are identical in content. Moore claimed that provisions of the Texas constitution and statutory law relied on by the Commissioners Court in their redistricting and appointments violated the Fourteenth Amendment both facially and as applied by the Commissioners Court.

Moore took no further steps in his state court action but went forward with his suit in federal district court. However, on February 18, 1975, the Supreme Court decided *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975), dealing with the same Texas constitutional and statutory provisions attacked in the present case. The Court held that Texas law was ambiguous and directed the court to abstain from passing on the federal constitutional issues under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Because of the niceties of Texas constitutional law, discussed more fully *infra*, the Supreme Court directed that the plaintiffs' action in federal court be dismissed without prejudice, thus enabling the plaintiffs to return to federal court once the state law had been clarified.

In the light of *Harris County Commissioners Court v. Moore*, the El Paso County Commissioners Court moved for dismissal on the basis of abstention. The district court granted the motion and the case was dismissed without prejudice on March 25, 1975.

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2. The record is ambiguous as to which action was filed first. Counsel for Appellant Moore stated at oral argument that the actions were filed "literally within hours of each other" and that he believed the federal action had been filed first. He explained that the duplicate filing was to prevent statute of limitations problems should one or the other of the actions be dismissed for any reason.

Since Moore already had a state court action pending, he used it to litigate his state law claims as required by *Pullman*. Summary judgment was granted for the defendant Commissioners in the trial court, and the decision was affirmed by the El Paso Court of Civil Appeals, 567 S.W.2d 15 (Tex.Civ.App.—El Paso 1978, writ ref. n. r. e.). The Texas Supreme Court refused the writ of error on October 11, 1978, and Moore filed the present action in federal court on December 11, 1978. Defendants moved for summary judgment on the grounds that the complaint was barred by the statute of limitations and res judicata. The district court granted defendants' motion on February 15, 1980. Moore appealed to this court.

The parties raised two basic issues on appeal: (1) was Moore's second federal suit barred by the statute of limitations, and (2) if not, did Moore freely and without reservation litigate his federal claims in the state courts so that any subsequent action would be barred by the doctrine of res judicata? We do not reach the second issue because of our determination of the first.

Statute of Limitations

[1, 2] In the traditional *Pullman* abstention case, a federal court will retain jurisdiction while the parties litigate the state law issues in the state courts. *Harris County Commissioners Court v. Moore, supra,* 420 U.S. at 88 n.4, 95 S.Ct. at 878 n.14; *Zwickler v. Koota,* 389 U.S. 241, 244 n.14, 88 S.Ct. 391, 393, 19 L.Ed.2d 444 (1967). However, the Texas courts have made clear that they cannot entertain a declaratory judgment proceeding while the federal court retains jurisdiction in the same controversy; the federal court's continuing jurisdiction to enter a final judgment has been interpreted by the Texas courts as precluding the state court from entering a final judgment itself. This renders any state court decision in such circum-

stances as advisory, and in violation of the Texas constitution's prohibition against advisory opinions. *United Services Life Ins. Co. v. Delaney*, 396 S.W.2d 855 (Tex.1965); *see Romero v. Coldwell*, 455 F.2d 1163 (5th Cir. 1972); *Barrett v. Atlantic Richfield Co.*, 444 F.2d 38 (5th Cir. 1971).

In order to ensure the sequence of events contemplated by the abstention doctrine, it is thus necessary in such cases to dismiss the federal action without prejudice. *Moore, supra; Abell v. Frank*, 625 F.2d 653 (5th Cir. 1980); *Ibarra v. Bexar County Hospital Dist.*, 624 F.2d 44 (5th Cir. 1980); *Romero v. Coldwell, supra; Barrett v. Atlantic Richfield Co., supra.* However, this procedure raises an interesting problem. The second federal action was filed on December 11, 1978, almost six years after the events of which Moore complains. Defendants argue that since the federal court did not retain jurisdiction, but required Moore to file a new action subsequent to the state court proceedings, the second federal action is barred by the statute of limitations. Moore argues in reply that the statute of limitations on the federal action should be tolled pending the outcome of the state litigation required by *Pullman*. In order to decide the issue we must look to the applicable law regarding the statute of limitations.

Moore brought the present action under 42 U.S.C. § 1983 and the Fourteenth Amendment. Where, as in this case, Congress has not established a statute of limitations or a body of tolling rules for a federally created cause of action, federal courts have "borrowed" the state law of limitations governing an analogous cause of action. *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975). With

respect to § 1983 actions, 42 U.S.C. § 1988 (1976) instructs the federal courts to refer to state statutes when federal law provides no rule of decision. *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978).

Robertson and *Johnson* direct us to ascertain the most appropriate and analogous Texas statute of limitations and tolling rules and to apply them unless we find them inconsistent with the federal Constitution or laws or with some important federal policy underlying the Constitution or laws. *See Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981).

[3-5] This circuit has recently held on the facts of a particular § 1983 action that the applicable Texas statute of limitations is Tex.Rev.Civ.Stat.Ann. Title 91, article 5526 (Vernon), which permits a period of two years in which suit is to be brought.[3] *Braden v. Texas A&M University System*, 636 F.2d 90 (5th Cir. 1981). Moore's pleadings allege that he was denied a property interest (his position and its emoluments) without due process of law. Therefore, as in *Braden*, we invoke article 5526(1), applicable to actions for trespass to property, and article 5526(2), applicable to actions for detaining property and for conversion, as the appropriate statutes of limitations in Moore's § 1983 action. 636 F.2d at 93. Then absent any tolling

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3. Tex.Rev.Civ.Stat.Ann. Title 91, article 5526 (Vernon) provides in pertinent part:

> There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:
>
> 1. Actions of trespass for injury done to the estate or the property of another.
>
> 2. Actions for detaining the personal property of another, and for converting such property to one's own use.
>
> . . . .
>
> 6. Action for injury done to the person of another.

period, the statute of limitations for Moore's § 1983 action should have run on or before January 1, 1975.[4]

Moore's second federal suit was filed on December 11, 1978, two months after the Texas Supreme Court denied a writ of error on Moore's state court action and almost six years after the cause of action had accrued. Moore admits that ordinarily his second suit would be barred by the statute of limitations, but in the light of the special circumstances of this case he asks us to fashion a tolling rule for *Pullman* situations in the Texas courts.

Two different tolling rules suggest themselves—one derived from Texas state law and a second proposed by Moore. Under each of the rules the statute would be tolled until the date on which Moore's state litigation was concluded. However, each rule gives a different starting point for when the tolling would begin.

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4. Although the statute of limitations and tolling provisions are governed by Texas law, when the cause of action accrues in a § 1983 suit is a question of federal law. *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981); *Lavellee v. Listi*, 611 F.2d 1129 (5th Cir. 1980); *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). *Moore's* § 1983 action could have accrued on December 27, 1972, when the Commissioners Court voted to redistrict, or on January 1, 1973, when Moore was relieved of his position as Justice of Peace. Moore filed his first district court action on December 31, 1974. If the earlier date applied, the action would have been filed more than two years from the time of accrual, and defendants have argued for this position. Defendants, however, did not plead a statute of limitations defense either to Moore's first federal action or to the state action filed simultaneously with it. Indeed, they have raised the point concerning the original federal action for the first time on this appeal to the second federal action. It is much too late for such objections—defendants have waived this affirmative defense with respect to the first action. Fed.R.Civ.P. 8(c); *Moore v. Tangipahoa Parish Sch. Bd.*, 594 F.2d 489 (5th Cir. 1979). Since the choice of December 27 or January 1 as the time of accrual makes no difference to our subsequent holding as regards the second federal suit, we do not decide the question. It is sufficient for us to say only that the cause of action had accrued on or before January 1, 1973.

As a general rule we would look initially to the law of the State of Texas for a tolling exception which would benefit Moore. *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). Texas does have a tolling rule which might conceivably be appropriate to a *Pullman-England* situation, where a federal plaintiff is prevented from raising particular claims in federal court by the pendency of state proceedings.[5] Under this rule, the statute would be tolled from the time the state proceedings required by *Pullman* were commenced until their conclusion.

Moore proposes a different tolling exception. Under his rule the federal court would toll the statute from the time that the first federal action was dismissed until the

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5. The courts of Texas have held that

> [a]s a general rule, where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right. *Cavitt v. Amsler*, 242 S.W. 246, 249 (Tex.Civ.App.—Austin 1922, writ dism'd).

Walker v. Hanes, 570 S.W.2d 534 (Tex.Civ.App—Corpus Christi 1978, writ ref. n. r. e.); *see First Natl. Bank v. NuWay Transports, Inc.*, 585 S.W.2d 813 (Tex.Civ.App.—Fort Worth 1979, no writ); *Fields v Austin*, 30 S.W. 386 (Tex.Civ.App. 1895, writ den. err ref.). This rule has been applied in cases where a plaintiff's rights are not determined until a pending litigation is completed. *See, e. g., McDonald v. Ayres*, 269 S.W. 1105 (Tex.Ct.Civ.App.—Galveston 1925, no writ) (statute did not run on plaintiff's suit for interest on note until it had been determined in another proceeding that he owned a one-half interest in note). This state of affairs is analogous to the *Pullman* situation, where the plaintiff cannot be sure that the state law in question violates his federal constitutional rights until a state court has construed the law.

The analogy to the *Pullman* situation is not perfect since the plaintiff is not completely prevented from litigating his federal claims pending the outcome of the state law issues. He may of course litigate both together. However, this forfeits his right to a federal forum and defeats the purposes behind *Pullman* abstention, for abstention is meant to be only a temporary and not a permanent abdication of federal jurisdiction. The tolling rule may thus be the most appropriate and analogous one.

time that the state proceedings were completed, thus avoiding the possibility that the statute might run between the time of the dismissal and the institution of the state suit.[6]

Although a tolling rule in *Pullman* situations like this one has obvious merits,[7] neither the state rule nor Moore's proposed rule would help Moore on the facts of this case. Even were we to choose one of these rules, Moore's second federal action would be barred. Moore's state suit and his first federal suit were filed with at most one day to spare. Moore's state litigation was concluded on October 11, 1978, when the Texas Supreme Court denied his application for a writ of error.[8] Moore did not file his second

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6. Because in this case Moore's state and first federal suit were filed simultaneously, the period provided by the Texas common law tolling period would actually be longer; but in most situations where plaintiff's counsel is not so prescient, the state action would usually be filed subsequent to dismissal and so the state rule would offer less protection.

7. Such a rule would vindicate the important federal policies underlying both *Pullman* and *England v. Louisiana Board of State Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). Under *England* the federal plaintiff has the right to have his federal claims eventually heard in the federal courts, his original forum of choice. But he must not litigate his claims in the state courts if he wishes to preserve that right. If a federal court relinquishes its jurisdiction in a *Pullman* situation in accordance with *Moore*, it is very possible, and indeed very likely, that the length of subsequent state law litigation will exceed the time remaining on the statute of limitations. This is especially so in actions alleging constitutional violations under 42 U.S.C. § 1983, for such suits brought in Texas will often have a statute of limitations of only two years. Absent a tolling rule, the federal plaintiff is then put to the unpleasant choice of either foregoing his right to a federal forum by litigating his federal claims in state court or hoping that the state litigation proves speedy and risking a complete forfeiture of his federal claims. The more complex the state issues, and the more successfully the defendants can engage in dilatory tactics, the more certain it is that the federal plaintiff will be robbed of the rights that *England* sought to preserve for him. Such a situation clearly does no justice to the policies which motivated the *Pullman* doctrine.

8. We have taken judicial notice of the exact date of the denial of the writ of error, as the information was not included in the record or in the briefs submitted by the parties.

federal suit until December 11, 1978. Thus under the Texas tolling rule, Moore's second federal suit was at least two months tardy. Ironically, under Moore's own proposed rule, his suit would be even later. The first federal suit was dismissed without prejudice on March 25, 1975, approximately three months after the statute had run. Thus under Moore's tolling rule his second suit would be a total of five months too late.

The possibility exists that the federal courts could create a tolling rule designed specifically to deal with the unique problems of *Pullman* abstention in the context of Texas cases. But Moore has not suggested any other rule for our consideration and we decline to speculate on what, if any, the proper rule would be. Of course any deviation from the Texas tolling rule would have to be justified under *Tomanio, Johnson v. Railway Express Agency* and *Robertson v. Wegmann* by showing that the Texas rule was inconsistent with the federal Constitution or laws or with a federal policy underlying them.

Because Moore's second suit is barred by the statute of limitations, the judgment of the district court dismissing Moore's second suit is affirmed.

AFFIRMED.

(Filed January 7, 1982)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-1300

D. C. Docket No. EP-78-CA-256

BRUNSON D. MOORE,
Plaintiff-Appellant,

versus

EL PASO COUNTY, TEXAS, T. UDELL MOORE, Etc., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before BROWN, WISDOM and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

November 5, 1981

ISSUED AS MANDATE: JAN 7 1982

(Filed January 7, 1982)

Brunson D. MOORE,
Plaintiff-Appellant,

v.

EL PASO COUNTY, TEXAS, T. Udell Moore, etc., et al.,
Defendants-Appellees.

No. 80-1300.
United States Court of Appeals,
Fifth Circuit.
Unit A
Dec. 28, 1981.

Appeal from the United States District Court for the Western District of Texas, Lucius Desha Bunton, Judge.

ON PETITION FOR REHEARING

(Opinion November 5, 1981, 5 Cir., 1981, 660 F.2d 586)

Before BROWN, WISDOM and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied. Appellant argues, for the first time in his petition for rehearing, that this court should adopt the functional view that when the initial federal action was filed on a timely basis, insofar as the Texas statute of limitations is concerned, the federal court need not thereafter concern itself with the statute of limitations. We do not consider arguments raised for the first time in a petition for rehearing.

APPENDIX B

(Filed February 19, 1980)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION
EP-78-CA-256

BRUNSON D. MOORE,
PLAINTIFF

vs.

EL PASO COUNTY, et al,
DEFENDANTS

ORDER

On February 13, 1980, came on to be heard the Defendants' Motion to Dismiss the Plaintiff's Original Complaint for the reasons that said complaint is barred by the statute of limitations and by the doctrine of res judicata.

The Court, after carefully considering the evidence, briefs and argument of counsel, is of the opinion that said motion is well-taken and accordingly,

IT IS ORDERED that the Defendants' Motion to Dismiss is hereby GRANTED.

Signed and entered this the 15th day of February, 1980.

/s/ Lucius D. Bunton
Lucius D. Bunton
United States District Judge

APPENDIX C

(Filed March 12, 1975)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION
CIVIL ACTION NO. EP-74-CA-272

BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas.
Plaintiff

vs.

EL PASO COUNTY COMMISSIONERS COURT, UDELL MOORE, Individually and as County Judge of El Paso County; RICHARD TELLES, Individually and as a Member of the El Paso County Commissioners Court; ROGELIO SANCHEZ, Individually and as a Member of the EL PASO COUNTY COMMISSIONERS COURT; SAM BLACKHAM, Individually and as a Member of the El Paso County Commissioners Court, CLYDE ANDERSON, Individually and as a Member of the El Paso County Commissioners Court.
Defendants

MOTION TO DISMISS

Defendants move the Court to dismiss the complaint on the ground that Plaintiffs right to relief depends solely on State law; a similar petition has been filed by Plaintiff in State Court containing the same questions of law and fact as the complaint filed in this cause; and the Court should not exercise its jurisdiction to enjoin enforcement of Texas statutes and the Texas Constitution because they

have not been authoritatively construed by the courts of the State of Texas.

/s/ George N. Rodriguez, Jr.
George N. Rodriguez, Jr.
Attorney for Defendants

I hereby certify that I have sent a copy of the foregoing motion to the Attorneys for the Plaintiffs by United States Mail on 12th day of March, 1975.

/s/ George N. Rodriguez, Jr.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION
CIVIL ACTION NO. EP-74-CA-272

BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas.
Plaintiff

vs.

EL PASO COUNTY COMMISSIONERS COURT, UDELL MOORE, Individually and as County Judge of El Paso County; RICHARD TELLES, Individually and as a Member of the El Paso County Commissioners Court; ROGELIO SANCHEZ, Individually and as a Member of the EL PASO COUNTY COMMISSIONERS COURT; SAM BLACKHAM, Individually and as a Member of the El Paso County Commissioners Court; CLYDE ANDERSON, Individually and as a Member of the El Paso County Commissioners Court.
Defendants

ORDER

On this the 25th day of March 1975 came on to be heard Defendant's motion to dismiss the above entitled and numbered cause; and it appearing to the Court that it should abstain from the issues involved herein.

It is the Order of this Court that the above styled and numbered cause be dismissed without prejudice against Plaintiff.

Signed and entered this 25th day of March 1975.

/s/ William S. Sessions
Judge

APPENDIX E

(Filed July 27, 1972)

IN THE DISTRICT COURT OF
EL PASO COUNTY, TEXAS
168th JUDICIAL DISTRICT
NO. 72-3199

D. F. WHITE, Justice of the Peace, A. H. SANCHEZ, Justice of the Peace, G. G. RUEDA, Justice of the Peace, BOB LEWIS, Justice of the Peace, and BRUNSON MOORE, Justice of the Peace,
Plaintiffs,

vs.

T. UDELL MOORE, County Judge of El Paso County, Texas, and the COMMISSIONERS COURT OF EL PASO COUNTY, TEXAS, a Body Politic, Composed of CLYDE C. ANDERSON, SAM BLACKHAM, RICHARD TELLES, and ROGELIO SANCHEZ, County Commissioners,
Defendants.

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now come D. F. WHITE, Justice of the Peace, A. H. SANCHEZ, Justice of the Peace, G. G. RUEDA, Justice of the Peace, BOB LEWIS, Justice of the Peace, and BRUNSON MOORE, Justice of the Peace, Plaintiffs, complaining of T. UDELL MOORE, County Judge of El Paso County, Texas, and the COMMISSIONERS COURT OF EL PASO COUNTY, TEXAS, a Body Politic, composed of CLYDE C. ANDERSON, SAM BLACKHAM, RICHARD TELLES, and ROGELIO SANCHEZ, County Commissioners, and for

grounds thereof would respectfully show the Court as follows:

I.

That Plaintiffs are duly elected Justices of the Peace of El Paso County, Texas, whose term of office expires December 31, 1974, except for the Honorable BRUNSON MOORE, Justice of the Peace, whose term of office expires December 31, 1972. That Defendants comprise the COMMISSIONERS COURT OF EL PASO COUNTY, TEXAS, and that T. UDELL MOORE is the County Judge of El Paso County, Texas, and that CLYDE C. ANDERSON, SAM BLACKHAM, RICHARD TELLES, and ROGELIO SANCHEZ are County Commissioners. That Plaintiffs and Defendants are all residents of El Paso County, Texas.

II.

That on July 24, 1972, the COMMISSIONERS COURT OF EL PASO COUNTY, TEXAS convened for the regular meeting of Commissioners Court, duly noticed, and that on motion, duly seconded, Commissioner SAM BLACKHAM moved the abolition of Justice of the Peace Precinct One, Place One, Justice of the Peace Precinct One, Place Two, Justice of the Peace Precinct Two, Justice of the Peace Precinct Three, Justice of the Peace Precinct Four, Justice of the Peace Precinct Five, Justice of the Peace Precinct Six, Justice of the Peace Precinct Seven, Justice of the Peace Precinct Eight, and the Constables in Precincts One, Precinct Two, Precinct Three, Precinct Four, Precinct Five, Precinct Six, Precinct Seven, and Precinct Eight. That such motion was thereafter called for question after discussion, and upon vote of the County Commissioners resulted in a tie of two (2) Commissioners, SAM BLACKHAM and CLYDE C. ANDERSON, to two (2) Commis-

sioners, RICHARD TELLES and ROGELIO SANCHEZ, and that such tie was broken by Judge T. UDELL MOORE, which resulted in the passage of such motion by a vote of three (3) to two (2). That such motion abolished all existing Justice of the Peace and Constable Precincts in El Paso County, Texas, effective August 1, 1972, and that the same is duly recorded in the Minutes of the Commissioners Court of El Paso County, Texas.

III.

That on the same agenda thereafter of Commissioners Court, on motion duly seconded, Commissioner SAM BLACKHAM moved the establishment of five (5) new Justices of the Peace Precincts in El Paso County, Texas, to become effective on August 1, 1972, in accordance with the map attached to such motion, and that such would be known as Justice of the Peace, Precinct One, Justice of the Peace, Precinct Two, Justice of the Peace, Precinct Three, Justice of the Peace, Precinct Four, and Justice of the Peace, Precinct Five, none of such Justice of the Peace Precincts to have two (2) places. That thereafter such motion was called for question after discussion, and the vote of the Commissioners resulted in a tie of two (2) County Commissioners, SAM BLACKHAM and CLYDE C. ANDERSON, to two (2) County Commissioners, RICHARD TELLES and ROGELIO SANCHEZ, and that such tie was broken by Judge T. UDELL MOORE, which resulted in the passage of such motion by a vote of three (3) to two (2). That such vote and motion are duly recorded in the Minutes of the Commissioners Court of El Paso County, Texas, and that a map of such Justice of the Peace Precincts One through Five is attached to such Minutes.

IV.

That on the same agenda thereafter of Commissioners Court, on motion duly seconded, Commissioner SAM BLACKHAM moved the appointment of BEN MEJIA as Justice of the Peace, Precinct One, AL MESTAN as Justice of the Peace, Princinct Two, DANNY SNOOKS as Justice of the Peace, Precinct Three, JAMES AYCOCK as Justice of the Peace, Precinct Four, and HECTOR ENRIQUEZ as Justice of the Peace, Precinct Five. That such motion also appointed Constables to the Constable positions attached thereto, and that B. H. STEVENSON was appointed Constable, Precinct One, ROBERT BURNSIDE was appointed Constable, Precinct Two, RAYMOND TELLES, JR. was appointed Constable, Precinct Three, JAMES RUSSELL was appointed Constable, Precinct Four, and VICTOR BELTRAN, JR. was appointed Constable, Precinct Five. That thereafter such motion was called for question after discussion and the vote of the Commissioners resulted in a tie of two (2) County Commissioners, SAM BLACKHAM and CLYDE C. ANDERSON, to two (2) County Commissioners, RICHARD TELLES and ROGELIO SANCHEZ, and that such tie was broken by Judge T. UDELL MOORE, which resulted in the passage of such motion by a vote of three (3) to two (2). That such motion was duly recorded in the Minutes of the County Commissioners Court of El Paso County, Texas.

V.

That on the same agenda thereafter of Commissioners Court, on motion duly seconded, Commissioner SAM BLACKHAM moved that salaries be established for the five (5) new Justices of the Peace Precincts in El Paso County, Texas, and moved that Justice of the Peace, Precinct One, be paid a salary of $12,500.00, to include all ex-

penses of office, Justice of the Peace, Precinct Two, be paid a salary of $12,500.00, to include all expenses of office, Justice of the Peace, Precinct Three, be paid a salary of $12,500.00, to include all expenses of office, Justice of the Peace, Precinct Four, to be paid a salary of $12,500.00, to include all expenses of office, and the Justice of the Peace, Precinct Five, be paid a salary of $12,500.00, to include all expenses of office. That such motion also included payment of office for Constables of the five (5) new Justice of the Peace Precincts, and set a salary of $1,800.00, including all expenses of office for the Constable of Precinct One, a salary of $1,800.00, including all expenses of office for the Constable of Precinct Two, a salary of $1,800.00, including all expenses of office for the Constable of Precinct Three, a salary of $1,800.00, including all expenses of office for the Constable of Precinct Four, and a salary of $1,800.00, including all expenses of office for the Constable of Precinct Five. That thereafter such motion was called for question after discussion and the vote of the Commissioners resulted in a tie of two (2) County Commissioners, SAM BLACKHAM and CLYDE C. ANDERSON, to two (2) County Commissioners, RICHARD TELLES and ROGELIO SANCHEZ, and that such tie was broken by Judge T. UDELL MOORE, which resulted in the passage of such motion by a vote of three (3) to two (2). That such vote and motion are duly recorded in the Minutes of the Commissioners Court of El Paso County, Texas.

VI.

That Petitioners are office-holders who are presently Justices of the Peace in El Paso County, Texas, who have a property right in such offices, and who have a financial and civil interest in the maintenance of the Justice of the Peace Precincts as they presently exist and are constituted,

and to which they are presently elected. That the Honorable BRUNSON MOORE, Justice of the Peace, Precinct One, Place One, is additionally the Democratic nominee for the office of Justice of the Peace, Precinct One, Place One, as the result of the Democratic Primary held May 6, 1972, and has been so certified for the election to be held in November, 1972, for the office of Justice of the Peace, Precinct One, Place One.

VII.

That the total abolition of the Justice of the Peace Precincts on July 24, 1972, and the removal from office of nine (9) Justices of the Peace in El Paso County, Texas, by the Commissioners Court, was not a division of the County for the convenience of the people and is unconstitutional as volitive of Article V, Section 18, of the Texas Constitution.

VIII.

That the total abolition of the Justice of the Peace Precincts on July 24, 1972, and the removal from office of nine (9) Justices of the Peace in El Paso County, Texas, by the Commissioners Court, was not a division of the County for the convenience of the people and the same is clearly beyond the jurisdiction of the Commissioners Court because the same is not a division into Precincts of not less than four (4) and not more than eight (8) Precincts in El Paso County, Texas, for the convenience of the people of El Paso County, Texas.

IX.

That the total abolition of the Justice of the Peace Precincts on July 24, 1972, and the removal from office of nine (9) Justices of the Peace in El Paso County, Texas,

and the establishment of only five (5) replacement justice of the Peace Precincts, is clearly beyond the jurisdiction of the Commissioners Court because the same establishes Precincts, each of which contains more than eight thousand (8,000) inhabitants or more, without establishing two (2) places in each of such Precincts, and that all of such motions taken together accomplish indirectly that which is clearly prohibited by the Texas Constitution and constitutes bad faith on the part of the Commissioners Court.

X.

That although the Commissioners Court has the discretion from time to time to divide the County into Precincts for the convenience of the people, pursuant to Article V, Section 18, of the Texas Constitution, the reduction of eight (8) Justice of the Peace Precincts to five (5) Justice of the Peace Precincts for El Paso County, and the abolition of the posts of nine (9) Justices of the Peace in El Paso County and a reduction and appointment of only five (5) Justices of the Peace for El Paso County, Texas, is a clear abuse of discretion by the Commissioners Court of El Paso County, Texas. That the same was accomplished by the Commissioners Court with callous disregard to the convenience of the people of El Paso County.

XI.

That by virtue of such motions, the Commissioners Court of El Paso County, Texas, has changed the compensation for the Justices of the Peace in El Paso County, Texas, from a fee system to a salary system, and that the same was not accomplished pursuant to the laws of the State of Texas, and was clearly beyond the jurisdiction of the Commissioners Court of El Paso County, Texas.

XII.

That prior to the meeting of the Commissioners Court held on July 24, 1972, and that during such meeting, no hearing or discussion was had to determine whether or not the action of such Commissioners Court in abolishing all of the existing Justice of the Peace Precincts and establishing new Justice of the Peace Precincts was for the convenience of the people of El Paso County, Texas. That such motions were passed in bad faith with callous disregard for the convenience of the people of El Paso County.

XIII.

That the five (5) Justice of the Peace Precincts which are to be established on August 1, 1972, are divided and apportioned in accordance with the map of the Precincts of El Paso County, Texas, which will not take effect until January 1, 1973, and that such Precincts which are to be established on August 1, 1972, are not established upon a known or existing map of the Precincts of El Paso County, Texas, and that the establishment of such five (5) Justice of the Peace Precincts which are established within Precincts which are to be effective in the future, are void, and that any such order based thereon is clearly beyond the jurisdiction of the Commissioners Court.

XIV.

That the appointment of BEN MEJIA as Justice of the Peace, Precinct One, AL MESTAN as Justice of the Peace, Precinct Two, DANNY SNOOKS as Justice of the Peace, Precinct Three, JAMES AYCOCK as Justice of the Peace, Precinct Four, HECTOR ENRIQUEZ as Justice of the Peace, Precinct Five, B. H. STEVENSON as Constable, Precinct One, ROBERT BURNSIDE as Con-

stable, Precinct Two, RAYMOND TELLES, JR. as Constable, Precinct Three, JAMES RUSSELL as Constable, Precinct Four, and VICTOR BELTRAN, JR. as Constable, Precinct Five, by the Commissioners Court, as Justices of the Peace and Constables of the five (5) new Precincts on July 24, 1972, to be effective on August 1, 1972, are void because the offices of Justice of the Peace, Precinct One, Justice of the Peace, Precinct Two, Justice of the Peace, Precinct Three, Justice of the Peace, Precinct Four, Justice of the Peace, Precinct Five, Constable, Precinct One, Constable, Precinct Two, Constable, Precinct Three, Constable, Precinct Four, and Constable, Precinct Five do not presently exist and did not exist on the day of the appointment by the Commissioners Court of El Paso County, Texas.

XV.

That by virtue of the unconstitutional order of the Commissioners Court abolishing all Justice of the Peace districts in El Paso County, Texas, which order is not only a clear abuse of discretion, made in bad faith, and clearly beyond the jurisdiction of the Commissioners Court, Petitioners are deprived of their rights to hold office as Justices of the Peace of El Paso County, Texas, and that the entire Justice of the Peace system as it presently exists and is constituted in El Paso County, Texas, is in danger of falling into chaos and confusion by reason of the penddency of cases presently docketed in the eight (8) Justice of the Peace Precincts, and which cases are set for hearing at a time and date after August 1, 1972, the same being after such Courts and Precincts are abolished in accordance with the order of the Commissioners Court of El Paso County, Texas. That by virtue the pendency of such cases, the inability of the of the

Peace to hold office, and the inability to receive just and due compensation for their offices by virtue of the illegal abolishment of the same, the inability to terminate the continuing expenses of office which cannot be reasonably terminated on or before August 1, 1972, and that all of the above, together with the allegations herein, will cause irreparable injury to the Plaintiffs for which there is no adequate remedy at law. Plaintiffs further allege that in order to protect their rights and the rights of the citizens of El Paso County, as herein alleged, a temporary restraining order should be issued restraining the Commissioners Court from dissolving Justice of the Peace Precinct One, Place One, Justice of the Peace Precinct One, Place Two, Justice of the Peace Precinct Two, Justice of the Peace Precinct Three, Justice of the Peace Precinct Four, Justice of the Peace Precinct Five, Justice of the Peace Precinct Six, Justice of the Peace Precinct Seven, and Justice of the Peace Precinct Eight and from instituting new Justice of the Peace Precinct One, Justice of the Peace Precinct Two, Justice of the Peace Precinct Three, Justice of the Peace Precinct Four, and Justice of the Peace Precinct Five, and that the present Justice of the Peace system should be retained as it is presently operating and constituted without change by the Court in any regard, until hearing herein, and that upon hearing herein, that this Honorable Court issue a temporary injunction to the same effect, directed to the Defendants herein, and that such injunction be made final upon hearing thereof.

WHEREFORE, premises considered, Plaintiffs pray that this Honorable Court restrain the COMMISSIONERS COURT OF EL PASO COUNTY, TEXAS from instituting the unlawful redistricting of the Justice of the Peace Precincts in El Paso County, Texas, and the entire scheme thereto, as set forth herein, and that upon final hearing

thereof, this Court declare the same as unconstitutional, as a clear abuse of discretion, in bad faith, and as clearly beyond the jurisdiction of the Commissioners Court because the same was not done or accomplished for the convenience of the people of El Paso County, Texas, and to declare that Justice of the Peace Precinct One, Place One, Justice of the Peace Precinct One, Place Two, Justice of the Peace Precinct Two, Justice of the Peace Precinct Three, Justice of the Peace Precinct Four, Justice of the Peace Precinct Five, Justice of the Peace Precinct Six, Justice of the Peace Precinct Seven, and Justice of the Peace Precinct Eight are lawfully existing, and that the Justices of the Peace serving therein are the legal and lawful office-holders, and for such other and further relief, both at law and in equity, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

PAXSON AND SANTIESTEBAN
Attorneys for the Plaintiffs
Suite 14-K El Paso National Bank Building
El Paso, Texas 79901
/s/ H. Tati Santiesteban
By: H. Tati Santiesteban
/s/ Marshall I. Yaker
By: Marshall I. Yaker

/s/ Wellington Y. Chew
Wellington Y. Chew
Attorney for the Plaintiffs
1300 Bassett Tower
El Paso, Texas 79901

APPENDIX F

(Filed December 31, 1974)

IN THE DISTRICT COURT OF
EL PASO COUNTY, TEXAS
120th JUDICIAL DISTRICT
No. 75-5

BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas,
Plaintiff,

v.

EL PASO COUNTY COMMISSIONERS COURT, UDELL MOORE, Individually and as County Judge of El Paso County; RICHARD TELLES, Individually and as a Member of the El Paso County Commissioners Court; ROGELIO SANCHEZ, Individually and as a Member of the El Paso County Commissioners Court; SAM BLACKHAM, Individually and as a Member of the El Paso County Commissioners Court; CLYDE ANDERSON, Individually and as a Member of the El Paso County Commissioners Court,
Defendants.

PLAINTIFF'S ORIGINAL PETITION

Comes now BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas, complaining of Defendants herein as set forth above, and for cause of action would respectfully show the Court the following:

I

Plaintiff is a resident of El Paso, El Paso County, Texas. Defendants are all residents of El Paso County, Texas and Defendant Udell Moore may be served with citation or process at 10120 Buckwood, El Paso, Texas; Defendant Richard Telles may be served with citation or process at 7420 Dale Road, El Paso, Texas; Defendant Rojelio Sanchez may be served with citation or process at 157 Aspen, El Paso, Texas; Defendant Sam Blackham may be served with citation or process at 415 SanSaba, El Paso, Texas; and Defendant Clyde Anderson may be served with citation or process at 3925 Altura, El Paso, Texas. Defendant EL PASO COUNTY COMMISSIONERS COURT may be served by serving Udell Moore, County Judge, at 10120 Buckwood, El Paso, Texas.

II

On or about December, 1972, the El Paso County Commissioners Court and above named individual Defendants promulgated an order which redistricted all Justice of the Peace Precincts in El Paso County, Texas, which said order took effect on January 1, 1973. By the terms and effect of this order Plaintiff was prevented from carrying out the duties of his office as Justice of the Peace, Precinct 1, Place 1, and was further deprived from receiving the emoluments of his office for the term to which he was elected.

III

The order referred to in Paragraph II above was purportedly promulgated pursuant to the terms and provisions of Article 5, Section 18 of the Texas Constitution

and Article 2351½ of the Texas Revised Civil Statutes. These provisions, as applied to support the order of the Commissioners Court referred to above, are unconstitutional on their face and in violation of the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In the alternative, it is alleged that if not in violation of said Fourteenth Amendment on their face, the order and the said provisions of Texas law are in violation of said Fourteenth Amendment as applied in the above referenced instance.

WHEREFORE, Plaintiff BRUNSON D. MOORE prays that the Defendants be cited in terms of law to appear and answer herein and that upon final hearing hereof said Plaintiff be reinstated as the duly elected Justice of the Peace, Precinct 1, Place 1, and that he be awarded all the emoluments of said office including past salary, which exceeds the sum of $10,000, which he would have received had he not been wrongfully deprived of such office, and that Defendants herein be permanently enjoined from enforcing the order described in Paragraph II above, and for such other and further relief, both special and general, at law or in equity to which Plaintiff may show himself justly entitled, and further, Plaintiff BRUNSON D. MOORE on behalf of the Resident Citizens of Former Justice of the Peace, Precinct 1, Place 1, of El Paso County, Texas, prays that said order be set aside and Defendants be permanently enjoined from enforcing such order, and that the duly elected Brunson D. Moore be reinstated and the office to which he was elected be reinstated, and for such other relief, both special and general, at law or in

equity, to which said Plaintiff may show himself justly entitled.

Respectfully submitted,

Mark F. Howell
1011 North Mesa Street
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Malcolm McGregor
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Monte B. Roberts, Jr.
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Attorneys for the Plaintiff
by /s/ Monte B. Roberts, Jr.
Monte B. Roberts, Jr.

ENDORSED: No. 75-5. BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas, Plaintiff v. EL PASO COUNTY COMMISSIONERS COURT et al. Plaintiff's Original Petition. Filed December 31 A. D. 1974 at 2:30 o'clock P.M. J. W. A. JOHNSON, Clerk, District Courts El Paso County, Texas by J. W. A. Johnson.

IN THE
DISTRICT COURT OF EL PASO COUNTY, TEXAS
120th JUDICIAL DISTRICT
No. 75-5

BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas, and Plaintiff,

v.

EL PASO COUNTY COMMISSIONERS COURT; UDELL MOORE, Individually and as County Judge of El Paso County; RICHARD TELLES, Individually and as a Member of the El Paso County Commissioners Court; ROGELIO SANCHEZ, Individually and as a Member of the El Paso County Commissioners Court; SAM BLACKBURN, Individually and as a Member of the El Paso County Commissioners Court; CLYDE ANDERSON, Individually and as a Member of the El Paso County Commissioners Court, Chuck Maddox, as a Member of the El Paso Commissioner's Court,
Defendants.

PLAINTIFFS' ORIGINAL PETITION

TO SAID HONORABLE COURT:

Comes now, BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas, and comes now HORACE CHAVEZ, who is and was at all times pertinent a duly registered and qualified voter residing in Precinct 1, Place 1, El Paso County, Texas, complaining of the Defendants herein as set forth above, and for cause of action would respectfully show the Court the following:

I.

Plaintiff is a resident of El Paso, El Paso County, Texas. Defendants are all residents of El Paso County, Texas and Defendant Udell Moore may be served with citation or process at 10120 Buckwood, El Paso, Texas; Defendant Richard Telles may be served with citation or process at 7420 Dale Road, El Paso, Texas; Defendant Rojelio Sanchez may be served with citation or process at 157 Aspen, El Paso, Texas; Defendant Sam Blackham may be served with citation or process at 415 San Saba, El Paso, Texas; Defendant Clyde Anderson may be served with citation or process at 3925 Altura, El Paso, Texas, and Chuck Maddox may be served with citation or process at Montoya at Red, El Paso, Texas. Defendant EL PASO COUNTY COMMISSIONERS COURT, may be served by serving Udell Moore, County Judge, at 10120 Buckwood, El Paso, Texas.

II.

On or about December, 1973, the El Paso County Commissioners Court and the above named individual Defendants promulgated an order which redistricted all Justice of the Peace Precincts in El Paso County, Texas, which said order took effect on January 1, 1973. By the terms and effect of this order Plaintiff, BRUNSON D. MOORE, was prevented from carrying out the duties of his office as Justice of the Peace, Precinct 1, Place 1, as was further deprived from term to which he was elected.

III.

The order referred to in Paragraph II above was purportedly promulgated pursuant to the terms and provisions of Article 2351½ of the Texas Revised Civil Statutes. These provisions, as applied to support the order of the

Commissioners Court referred to above, are unconstitutional on their face and in violation of the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In the alternative, it is alleged that if not in violation of said Fourteenth Amendment on their face, the order and the said provisions of Texas law are in violation of said Fourteenth Amendment as applied in the above referenced instance.

IV.

Plaintiff, BRUNSON D. MOORE, is entitled to recover from the Defendants all of the emoluments of the office to which he was elected.

V.

Plaintiff, HORACE CHAVEZ, seeks a declaratory judgment in behalf of all voters voting in the election in which Brunson D. Moore was elected, that the action of the El Paso County Commissioners Court in December, 1972 is void.

VI.

The action taken by the Commissioners Court is an impermissible abridgement of the franchise of persons who voted for and elected Plaintiff to office as Justice of the Peace, Precinct 1, Place 1, El Paso County, and is a violation of the Equal Protection Clause of the United States Constitution. There is no compelling state interest to be served by the action of the Commissioners Court. The action of the Commissioners Court invidiously and irrationally discriminates between Brunson Moore and others not so effected and between the effect of the votes cast and voters electing Brunson Moore and voters

in other precincts where votes were not so robbed. No compelling state interest is served by such discrimination.

VII.

Plaintiff, BRUNSON D. MOORE, is entitled to recover a reasonable attorney fee, under the Provisions of Article 2226, Revised Civil Statutes of Texas. Plaintiff heretofore requested that the Defendants make payment of the wages due him and since such request more than thirty days have elapsed without payment having been made.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that citation issue to the Defendants requiring them to appear and answer as required by law and upon trial Plaintiffs recover judgment declaring the action of the Commissioners Court void; that Plaintiff, BRUNSON D. MOORE, recover as damages all of the emolument of office, the Plaintiff recover attorney fees, and that Plaintiffs be granted such other and further relief as they may show themselves entitled to receive.

(Filed April 4, 1977)

IN THE
DISTRICT COURT OF EL PASO COUNTY, TEXAS
120th JUDICIAL DISTRICT
No. 75-5

BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas,
Plaintiff,

v.

EL PASO COUNTY COMMISSIONERS COURT: UDELL MOORE, Individually and as County Judge of El Paso County; RICHARD TELLES, Individually and as a Member of the El Paso County Commissioners Court; ROGELIO SANCHEZ, Individually and as a Member of the El Paso County Commissioners Court; SAM BLACKHAM, Individually and as a Member of the El Paso County Commissioners Court; CLYDE ANDERSON, Individually and as a Member of the El Paso County Commissioners Court,
Defendants.

JUDGMENT

On March 10, 1977, the Court heard the Plaintiff's and Defendants' Motions for Summary Judgment in the above styled and numbered cause. It appears to the Court that such motions have been made in proper form and time, that proper service of the Plaintiff's and Defendants' Motions have been made and that both Plaintiff and Defendants have been properly notified of the hearing on these Motions. Having considered the Plaintiff's Motion, the pleadings, and affidavits on file herein as well as the arguments of counsel, the Court denies Paintiff's Motion

for Summary Judgment. Having also considered the Defendants' Motion, the pleadings, and affidavits on file herein as well as the arguments of counsel, the Court finds that there is no genuine issue of any material fact, and that Defendants are entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Summary Judgment is denied, and Defendants' Motion for Summary Judgment is granted, and it is accordingly ORDERED, ADJUDGED and DECREED by the Court that Plaintiff take nothing and that Defendants recover their costs of suit, to all of which the Plaintiff in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Eighth Supreme Judicial District.

SIGNED this 4th day of April, 1977.

/s/ Hans E. Brockmoller
District Judge

Approved As to Form:

/s/ Mark F. Howell
Mark F. Howell
Attorney for Plaintiff

/s/ George N. Rodriguez, Jr.
George N. Rodriguez, Jr.
Attorney for Defendants

APPENDIX G

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
243RD JUDICIAL DISTRICT
NO. 77-7644

BRUNSON D. MOORE, On His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace, Precinct 1, Place 1, of El Paso County, Texas, Plaintiff,

vs.

THE COUNTY OF EL PASO, TEXAS, Defendant.

PLAINTIFF'S ORIGINAL PETITION

TO THE SAID HONORABLE COURT:

Comes now BRUNSON D. MOORE, Plaintiff, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace, Precinct 1, Place 1, of El Paso County, Texas, complaining of Defendant, the COUNTY OF EL PASO, TEXAS, and for cause of action would show the Court the following:

I.

Plaintiff is a resident of El Paso County, Texas. Defendant may be served by serving T. UDELL MOORE, County Judge of El Paso County, Texas, El Paso City-County Building El Paso, Texas.

II.

On November 7, 1972, Plaintiff, BRUNSON D. MOORE, was duly elected to the office of Justice of the Peace,

Precinct 1, Place 1. On December 21, 1972, Plaintiff qualified for the office of Justice of the Peace by taking his Oath of Office, and filing the Oath and a Bond, with good and sufficient sureties, in the office of the County Clerk of El Paso County, Texas.

On or about December, 1972, the Defendant, the COUNTY OF EL PASO, an entity, and acting by and through its duly elected officers and members constituting the El Paso County Commissioners' Court, and being duly convened on a motion duly made and seconded and passed by a majority of the Court then sitting, entered its legislative order effective December 31, 1972, purporting to redistrict the Justice of the Peace precincts of El Paso County. Said Commissioners' Court further purported to declare vacant the office of Justice of the Peace, Precinct 1, Place 1, and to appoint DANNY J. SNOOKS to fill such "vacancy".

III

As a result of the December 27, 1972 legislative order referred to in paragraph II above, Plaintiff, BRUNSON D. MOORE, was removed from office. The order was purportedly promulgated pursuant to the terms and provisions of Article 2351½ of the Texas Revised Civil Statutes. These provisions, as applied to support the order of the Commissioners' Court referred to above, are unconstitutional on their face and in violation of the privileges and immunities clause, the due process clause, and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America. In the alternative, it is alleged that if not in violation of said Fourteenth Amendment on their face, the order and the said provisions of Texas law are in violation of said Four-

teenth Amendment as applied in the above-referenced instance.

IV.

In the said legislative order of December 27, 1972, the Defendant, the COUNTY OF EL PASO, by and through its duly organized body of the El Paso County Commissioners' Court appointed DANNY J. SNOOKS as Justice of the Peace, Precinct 1, Place 1, of El Paso County, Texas, even though no vacancy had existed therein, and, further, even though the term of office of Justice of the Peace BRUNSON D. MOORE, Precinct 1, Place 1, did not expire until December 31, 1976.

V.

Article 5, Section 18, of the Texas Constitution provides for the creation of the office of the Justice of the Peace and Constable within a duly organized county. It is provided in Article 5, Section 18, that a Commissioners' Court of a county may, from time to time, redistrict said Justice of the Peace and Constable precincts for the convenience of the people. Subsequent to the adoption of Article 5, Section 18 of the Texas Constitution, the Legislature of the State of Texas, in 1965, passed an enabling statute to wit: Article 2351½ of Vernon's Annotated Texas Statutes. Said Article 2351½(c) of Vernon's Annotated Texas Statutes sought to interpret the meaning of Article 5, Section 18 of the Texas Constitution with reference to redistricting Justice of the Peace and Constable precincts in the State of Texas, and, further, it sought to determine when a vacancy occurred in those offices.

Article 2351½(c), Vernon's Annotated Texas Statutes, was interpreted in this instance by the Defendant that when the various Justice of the Peace and Constable

precincts were reapportioned, all offices became vacant and the Defendants could appoint whomever they so desired to fill the positions. This was done in this instance and so considered by the Defendant, the COUNTY OF EL PASO, even though Article 5, Section 24; Article 5, Section 28; and Article 16, Section 14 of the Texas Constitution provides otherwise. Your Plaintiff would show and allege to the Court that the enabling statute authorized by the Legislature of the State of Texas, to wit: Article 2351½(c), Vernon's Annotated Texas Statutes, violates the provisions of Article 5, Section 24; Article 5, Section 28; and Article 16, Section 14 of the Texas Constitution, as well as the equal protection and due process provisions of the Fourteenth Amendment to the Constitution of the United States of America.

Therefore, Article 2351½(c), Vernon's Annotated Texas Statutes, is in conflict with the constitutional provisions as heretofore set out, and the order entered on December 27, 1972, by the Defendant, complained of herein by Plaintiff, having been adopted pursuant to the authority of Article 2351½(c), Vernon's Annotated Texas Statutes, is in conflict with the state and federal constitutional provisions as well, and said order of Defendant of December 27, 1972, is null and void *ab initio* from the beginning and Plaintiff was wrongful removed from the office to which he had been elected and qualified at the time of his wrongful removal from office by the Defendant through the action of the County Commissioners' Court on December 27, 1972, thereby causing great damage and injury to Plaintiff herein and for which he is entitled to compensation for his loss of earnings, damages, emoluments of office, costs of lawsuits, and for attorney's fees.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, BRUNSON D. MOORE, prays that the Defendant, the

COUNTY OF EL PASO, be cited in terms of law to appear and answer herein, and that upon final hearing Plaintiff be reinstated as the duly elected Justice of the Peace, Precinct 1, Place 1, and that Plaintiff be awarded all the emoluments of said office, including past salary which exceeds the sum of $10,000.00.

Further, Plaintiff prays that he recover his other damages and have such other and further relief as he may show himself entitled to receive.

Respectfully submitted,

Howell & Fields
Attorneys for Plaintiff
4171 N. Mesa, C-105
El Paso, Texas 79902
By: /s/ Mark F. Howell
Mark F. Howell

APPENDIX H

(Filed December 3, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION
Civil No. EP74-CA-272

BRUNSON D. MOORE, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas,
Plaintiff,

v.

EL PASO COUNTY COMMISSIONERS COURT; UDELL MOORE, Individually and as County Judge of El Paso County; RICHARD TELLES, Individually and as a Member of the El Paso County Commissioners Court; ROGELIO SANCHEZ, Individually and as a Member of the El Paso County Commissioners Court; SAM BLACKHAM, Individually and as a Member of the El Paso County Commissioners Court; CLYDE ANDERSON, Individually and as a Member of the El Paso County Commissioners Court,
Defendant.

COMPLAINT

I

COMES NOW the plaintiff, BRUNSON D. MOORE on his own behalf and on behalf fo every resident citizen of the former Justice of the Peace Precinct 1, Place 1, of El Paso County, Texas, and for cause of action against the Defendants states:

This action arises under the provisions of the Constitution of the United States, and the jurisdiction of this

Court is derived from 28 USC 2281, and 28 USC 1331 and the amount in controversy herein exceeds the sum of $10,000.00.

II

Plaintiff is a resident of El Paso, El Paso County, Texas. Defendants are all residents of El Paso County, Texas and Defendant Udell Moore may be served with citation or process at 10120 Buckwood, El Paso, Texas; Defendant Richard Telles may be served with citation or process at 420 Dale Road, El Paso, Texas; Defendant Rojelio Sanchez may be served with citation or process at 157 Aspen, El Paso, Texas; Defendant Sam Blackham may be served with citation or process at 415 SanSaba, El Paso, Texas; and Defendant Clyde Anderson may be served with citation or process at 3925 Altura, El Paso, Texas. Defendant EL PASO COUNTY COMMISSIONERS COURT may be served with citation or process by serving Udell Moore, County Judge, at 10120 Buckwood, El Paso, Texas.

III

On or about December, 1972, the El Paso County Commissioners Court and the above named individual Defendants promulgated an order which redistricted all Justice of the Peace Precincts in El Paso County, Texas, which said order took effect on January 1, 1973. By the terms and effect of this order Plaintiff was prevented from carrying out the duties of his office as Justice of the Peace, Precinct 1, Place 1, and was further deprived from receiving the emoluments of his office for the term to which he was elected.

IV

The order referred to in Paragraph 11 above was purportedly promulgated pursuant to the terms and provisions of Article 5, Section 18 of the Texas Constitution and Article 2351½ of the Texas Revised Civil Statutes. These provisions, as applied to support the order of the Commissioners Court referred to above, are unconstitutional on their face and in violation of the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In the alternative, it is alleged that if not in violation of said Fourteenth Amendment on their face, the order and the said provisions of Texas law are in violation of said Fourteenth Amendment as applied in the above referenced instance.

WHEREFORE, Plaintiff BRUNSON D. MOORE, prays that the Defendants be cited in terms of law to appear and answer herein and that upon final hearing hereof said Plaintiff be reinstated as the duly elected Justice of the Peace, Precinct 1, Place 1, and that he be awarded all the emoluments of said office including past salary, which exceeds the sum of $10,000.00, which he would have received had he not been wrongfully deprived of such office, and that Defendants herein be permanently enjoined from enforcing the order described in Paragraph II above, and for such other and further relief, both special and general, at law or in equity to which Plaintiff may show himself justly entitled, and further, Plaintiff BRUNSON D. MOORE on behalf of the Resident Citizens of Former Justice of the Peace, Precinct 1, Place 1, of El Paso County, Texas, prays that said order be set aside and Defendants be permanently enjoined from enforcing such order, and that the duly elected Brunson D. Moore be reinstated and the office to which he was elected be reinstated, and

for such other relief, both special and general, at law or in equity, to which said Plaintiff may show himself justly entitled.

Respectfully submitted,

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by /s/ Monte B. Roberts, Jr.
Monte B. Roberts, Jr.